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No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

SYRACUSE PEACE COUNCIL, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the public interest standard in the Communications Act of 1934 requires that broadcast licensees act as public trustees to afford a reasonable opportunity for the discussion of conflicting views on issues of public importance.

2. If so, whether this requirement is constitutional under the First Amendment.

PARTIES BELOW

The petitioners here, Syracuse Peace Council, Henry Geller and Donna Lampert, and Office of Communication of the United Church of Christ, were petitioners below. The respondents below and here are the Federal Communications Commission and the United States of America. Intervenors below in support of petitioners were the Democratic National Committee, the Democratic Congressional Campaign Committee, and the Democratic Senatorial Campaign Committee. Intervenors below in support of respondents were Meredith Corporation, CBS, Inc., Radio-Television News Directors Association, American Newspaper Publishers Association, National Broadcasting Co., Inc., Freedom of Expression Foundation, and Reporters Committee for Freedom of the Press.

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SYRACUSE PEACE COUNCIL, *et al.*,
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v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a) is reported at 867 F.2d 654. The orders of the Court of Appeals denying rehearing and rehearing *en banc* (App. 75a, 76a) are unreported. The Report and Order of the Federal Communications Commission (App. 188a) is reported at 2 F.C.C. Rcd. 5043; it incorporates the Report at 102 F.C.C.2d 143 (App. 77a). The Commission's Memorandum Opinion and Order denying reconsideration (App. 282a) is reported at 3 F.C.C. Rcd 2035.

JURISDICTION

The judgment of the Court of Appeals was entered on February 10, 1989 (App. 73a). Rehearing and Rehearing *en banc* were denied on April 25, 1989 (App. 75a, 76a). The jurisdiction of the Court is invoked under 28 U.S.C. Secs. 1254(1) and 2350(a).

STATUTE INVOLVED

The pertinent portions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. Sec. 151 *et seq.*, are as follows:

Section 303(a)-(d), (f)-(j) (47 U.S.C. 303 (a)-(j)):

Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall —

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: Provided, however, That changes in the frequencies, authorized power, or in the times of operation of any station shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote

public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

Section 307 (a)-(c) (47 U.S.C. 307 (a)-(c)):

(a) **Grant.** The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor, a station license provided for by this Act.

(b) **Allocation of facilities.** In considering applications for licenses, and modifications and renewals thereof, when insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

(c) **Terms.** No license granted for the operation of a television broadcasting station shall be for a longer term than five years and no license so granted for any other class of station (other than a radio broadcasting station) shall be for a longer term than ten years, and any license granted may be revoked as hereinafter provided. Each license granted for the operation of a radio broadcasting station shall be for a term of not to exceed seven years. The term of any license for the operation of any auxiliary broadcast station or equipment which can be used only in conjunction with a primary radio, television, or translator station shall be concurrent with the term of the license for such primary radio, television, or translator station. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed five years in the case of television broadcasting licenses, for a term not to exceed seven years in the case of radio broadcasting licenses, and for, a term of not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby ... .

Section 309(a) (47 U.S.C. 309(a)):

(a) **Considerations in granting application.** Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 [47 U.S.C. Section 308] applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be

served by the granting thereof, it shall grant such application.

Section 312(a) (47 U.S.C. 312(a)):

(a) **Revocation of station license or construction permit.** The Commission may revoke any station license or construction permit —

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 [47 U.S.C. Section 308];
(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;
(3) for willful or repeated failure to operate substantially as set forth in the license;
(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States;
(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section;
(6) for violation of section 1304, 1343, or 1464 of title 18 of the United States Code [18 U.S.C. Sections 1304, 1343, or 1464]; or
(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Fed-

eral elective office on behalf of his candidacy.

Section 315(a) (47 U.S.C. 315):

(a) **Equal opportunities requirement; censorship prohibition; allowance of station use; news appearances exception; public interest; public issues discussion opportunities.** If any license shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any —

(1) bona fide newscast,
(2) bona fide news interview,
(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the new documentary), or
(4) on-the-spot coverage of bona-fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot

coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

STATEMENT OF THE CASE

This petition seeks review of the judgment below,[1] affirming the orders of the Federal Communications Commission (herein the Commission or FCC) eliminating the fairness doctrine. The doctrine requires broadcasters as public trustees (1) to give adequate coverage to public issues (2) with a reasonable opportunity for the expression of conflicting views. The basic facts are as follows:

Upon complaint of the Syracuse Peace Council, the FCC in 1984 found that Meredith Corporation, the licensee of TV Station WTVH in Syracuse, N.Y., had violated the above noted second duty of the fairness doctrine when it ran a series of advertisements on the desirability of a nuclear power plant without affording the opportunity for opposing views.[2] Meredith sought reconsideration, arguing, *inter alia,* for the first time, that the fairness doctrine was unconstitutional.

While agency reconsideration was pending, the Commission issued a report on the doctrine.[3] That 1985 report concluded that

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[1]The Court of Appeals had jurisdiction pursuant to Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 402(a), and 28 U.S.C. Sec. 2342.

[2]*Syracuse Peace Council*, 99 F.C.C.2d 1389 (1984).

[3]*Inquiry into Alternatives to the General Fairness Obligations of Broadcast Licensees*, 102 F.C.C.2d 143 (1985), herein 1985 Fairness Report. App. 77a.

the doctrine disserved the public interest, relying largely on the grounds that it was not needed in light of the growth in the number of broadcast outlets and that it chilled debate because it worked against broadcaster coverage of controversy. App. 179a. The Commission, however, declined to eliminate the doctrine, stating that it wished to defer to Congress in light of the latter's great interest, and to the courts as to constitutionality. App. 179a-180a.

In disposing of Meredith's petition for reconsideration, the Commission again refused to rule on the constitutional issue. The Court of Appeals affirmed the FCC's finding that Meredith had violated the doctrine, but remanded the case to the Commission. The court pointed out that in another decision[4] it had held that the fairness doctrine is not mandated by the statute. Because of that decision, which was issued after briefs in Meredith's review proceeding had been filed, the court ruled that the Commission had to resolve the constitutional issue, unless it were to determine that the doctrine is contrary to the public interest.[5]

The agency, after receiving comment from the general public, ruled in Meredith's favor.[6] It incorporated the 1985 Fairness Report into the record and reaffirmed the findings and conclusions therein.[7] It concluded that "...the fairness doctrine chills speech and is not narrowly tailored to achieve a substantial

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[4]*Telecommunications Research & Action Center* v. *FCC*, 801 F.2d 501, 517-518 (D.C. Cir. 1986), *reh'g en banc denied*, 806 F.2d 1115 (D.C. Cir. 1986) (herein *TRAC*), *cert. denied*, 107 S. Ct. 3196 (1987).

[5]*Meredith Corp.* v. *FCC*, 809 F.2d 863, 873-4 (D.C. Cir. 1987).

[6]*Syracuse Peace Council*, 2 F.C.C. Rcd. 5043 (1987), *recon. denied*, 3 F.C.C. Rcd 2035 (1988). App. 187a, .

[7]*Id.* at 5066, n.120 (App. 230a).

government interest" — that it thus "...contravenes the First Amendment and thereby disserves the public interest."[8]

On appeal, the court below affirmed. In an opinion by Judge Williams, with Chief Judge Wald concurring, the panel affirmed the Commission's holding eliminating the second part of the fairness doctrine. The opinion does not reach the constitutional issues,[9] but rather affirms on the ground that the "FCC's decision that the fairness doctrine no longer serves the public interest is a policy judgment ...[to which the court owes] great deference" (App. 13a). The opinion terms reasonable or permissible the Commission's findings as to the great growth in electronic media outlets and the deterrent effects of the doctrine. App. 16a-25a.

With Judge Starr concurring and Chief Judge Wald dissenting, the opinion also upholds as reasonable the FCC's recision of the first prong of the fairness doctrine — the duty to present controversial issues. App. 30a-32a. The essential holding is that "... the Commission reasonably eliminated Part One in light of [its] findings that the explosive growth in media outlets, combined with the removal of the deterrent to controversial public issue programming imposed by Part Two of the doctrine, will adequately ensure availability of such programs" (concurring opinion of Judge Starr, App. 72a).

A petition for rehearing was denied on April 25, 1989 (App. 75a); on the same day, a suggestion for rehearing en b*anc* was denied (App. 76a).

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[8]*Id.* at 5057 (App. 277a).

[9]In a concurring opinion, Judge Starr concludes that the constitutional issue cannot be avoided, and affirms the FCC on the ground that the fairness doctrine does violate the First Amendment. App. 54a, 72a.

REASONS FOR GRANTING THE WRIT

I. The FCC's decision, as affirmed by the court below, subverts the long established public trustee concept for broadcasting, and adopts instead the print model.

It is, we submit, not possible to conceive of a case of greater importance to the regulation of broadcasting under the Communications Act than this one. The case reopens the fundamental issue long since deemed settled by the seminal decisions of this Court in *Red Lion* and *NBC*.[10] The Commission's holding, if not reversed, will subvert the public trustee or fiduciary model established in the 1934 Communications Act, and substitutes therefor a print regulatory model. Significantly, both in the last Congress and the present one, there is clear-cut recognition of the sweeping effect of the decision.[11]

The basic public interest scheme for regulation of broadcasting established in the 1934 Communications Act is set out in the above seminal cases. Radio is inherently not open to all: Many more people want to broadcast than there are available frequencies, and Government must choose one entity and — to prevent engineering chaos — enjoin all others from using the frequency.

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[10]*Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943).

[11]See, *e.g.*, S. 742, 100th Cong.; *infra*, n.25. Thus, Chairman John Dingell of the House Energy and Commerce Committee has stated that if the fairness doctrine is struck down, "...I will work for a new regulatory deal for broadcasting which abandons the public trustee model and looks to spectrum fees or auctions"; that while such fees or auctions are not the "best way" to provide public service, there may be "no other choice." *Television Digest*, March 7, 1988, at 1-2.

We discuss within the effect of this strong Congressional interest on this Court's disposition of this petition. *Infra*, at 22.

This scarcity — based not on the number of outlets[12] or a comparison of broadcast outlets with other media but on the number of those who seek broadcast frequencies compared to the number of frequencies available[13] — is the "unique characteristic" of radio that supports its regulatory scheme.[14] Neither the FCC nor the broadcast intervenors dispute that this same scarcity — many more people wanting to broadcast than there are available frequencies — exists today.[15]

In conferring these scarce privileges, the Government could have required the licensees to operate as common carriers. Or, as this Court pointed out in *Red Lion*, *supra*, 395 U.S. at 390-91, "[r]ather than confer monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government surely could have decreed that each frequency should be shared among all or some of those who wish to use, each being assigned a

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[12]*Red Lion* was a radio case, at a time when there were roughly 6900 radio stations; today there are roughly 10,000 radio stations. *Inquiry Concerning Alternatives to the General Fairness Obligations of Broadcast Licensees*, 2 F.C.C.Rcd 5272, 5293 (1987); *Syracuse Peace Council*, *supra*, 2 F.C.C. Rcd at 5053, App. 250a-251a. It cannot be seriously argued that the fairness doctrine is permissible at 7000 stations but at 10,000 it is not.

[13]See *Red Lion*, *supra*, 395 U.S. at 390, 399; *Fairness Report*, 48 F.C.C.2d 1, 4 n.4 (1974).

[14]See *NBC*, *supra*, 319 U.S. at 226.

[15]There are no frequencies open in the large markets where the bulk of the population resides; there is a continuing large number of comparative hearings involving multiple applicants for the same frequency or channel; and land mobile interests seek UHF broadcast frequencies and are resisted by broadcasters, claiming that they need this scarce spectrum for High Definition TV. See S. Rept. No. 100-34, on S.742, 100th Cong., 1st Sess., at 21-23 (1987) (herein 1987 Senate Report); H. Rept. No. 100-108, on Fairness in Broadcast Act of 1987, 100th Cong., 1st Sess., at 13-18 (1987) (herein 1987 House Report).

portion of the broadcast day or the broadcast week."

The Government instead decided upon a public interest licensing scheme. The broadcast applicant is a volunteer who pays no money for this scarce privilege. But it receives no property right in the frequency[16] — "no right to an unconditional monopoly of a scarce resource the Government has denied to others the right to use." *Red Lion, id.* at 391. Rather, to protect the First Amendment rights of these others, the broadcaster receives only a short term license and agrees to serve the public interest in its administration of the frequency — to be a "fiduciary" for its community. *Id.* at 390. Thus, under this scheme, "it is the rights of the viewers and listeners, and not the broadcasters, which are paramount." *Id.* The decisions of this Court to this effect are numerous.[17]

Most significantly, neither the Commission nor the court below discuss or take into account this statutory scheme. Rather, the Commission, as affirmed by the court below, drastically changes the scheme. This is shown by consideration of the leading fairness case, *Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966) (herein *UCC I*), involving a raging controversy in Jackson, Miss., in the early 1960's over school desegregation. The licensee of one the two television stations in Jackson, WLBT-TV, vigorously espoused only the segregationist point of view, editorializing against integration and presenting only the White Citizens Council, although blacks constituted 45% of the area's population. The Court of Appeals, in an opinion by then Judge Burger,

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[16]See Section 309(h), 47 U.S.C. 309(h).

[17]In addition to *Red Lion* and *NBC*, see, *e.g.*, *FCC* v. *League of Women Voters*, 468 U.S. 364, 377, 381 (1984); *CBS, Inc.* v. *FCC*, 453 U.S. 367, 395, 397 (1981); *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 799 (1978); *CBS* v. *DNC*, 412 U.S. 94, 111 (1973).

reversed the FCC's failure to hold a hearing at renewal, stating that compliance with the fairness doctrine is the "sine qua non" of every broadcast licensee if it is to obtain renewal (*id.* at 1009); that unlike a newspaper, a broadcast station "cannot be operated at the whim or caprice of its owners ... [but rather] is a public trust subject to termination for breach of duty" (*id.* at 1003).

All this is changed under the Commission's new approach, as affirmed by the court below. The station is no longer a "public trust"; it *can* be operated at the whim of its owners. Indeed, a licensee, if challenged that it presented only the segregationist point of view on this important issue, could now assert to the FCC: "I am a racist and agree only with that viewpoint, so that is all I will present on this channel over which I have been given a monopoly."[18] Incredibly, the agency will now renew that broadcaster — the antithesis of a public trustee — as serving the public interest.

This *UCC-I*-type situation will undoubtedly proliferate over time. Station owners can feel strongly about many issues — abortion, school prayer, gun control, etc. — and can now operate their stations so as to present only the viewpoint with which they agree or for which they are paid. But see *Red Lion*, *supra*, 395 U.S. at 392. Speakers with deep pockets, like unions, religious groups, business associations, etc., all could seek stations for proselytizing their viewpoints, *and only their viewpoints*, while others would be precluded.

A broadcaster clearly should not act as did WLBT-TV and be renewed as a public trustee. Such a broadcaster is not acting as a trustee for the public, including the 45% black population, in its community. Rather, common sense dictates that it is acting in

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[18]The broadcaster is of course free — and indeed encouraged — to express a viewpoint. The obligation imposed by the trusteeship is to share the frequency by affording reasonable opportunity for contrasting views.

its *private* interest — not the *public* interest. Common sense also compels the conclusion that in this statutory scheme, there is a bedrock or underlying fairness requirement that must be observed. It is for this reason that the federal licensing agency early rejected the notion of propaganda stations.[19] This particular FCC may believe that debate, and thus the public interest, is better served by such a notion, but that is emphatically not the statutory scheme, and it is the Congressional judgment to opt for a public trustee approach that governs this non-constitutional question.

Both the Commission and the court below erroneously relied upon the growth of electronic outlets, ignoring the critical consideration of continuing "allocational" scarcity (many more wanting to broadcast than there are available frequencies). Even more serious is that in the final analysis the Commission and the court below simply opt for the print regulatory model as preferable policy, and ignore the Congressional policy. Thus, the court, after holding that it is not possible to determine whether the doctrine's "overall net effect [was] to reduce the coverage of controversial issues" (App. 24a), nevertheless upholds the Commission's judgment on the ground that the policy in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), is reasonable and should govern here (App. 25a):

> ... [The Commission] was persuaded that the doctrine's deterrent effects were on the same scale as its expression-generating ones, and it plainly discounted the *value* of the latter as "governmentally-coerced speech." *Id.* Accordingly it rejected the doctrine as a matter of policy. That policy judgment seems to us by no means arbitrary or

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[19]See *Great Lakes Broadcasting Co.*, 3 F. R. C. Ann. Rep. 29, 33 (1929); *Fairness Report*, *supra*, 48 F.C.C.2d at 6 n.6. The public interest standard was reenacted in the 1934 Act, thus showing Congressional ratification of fairness as an integral part of that standard. See *Red Lion*, *supra*, 395 U.S. at 380-82.

> capricious, and indeed quite similar to the Supreme Court's finding of similar value judgments implicit in the First Amendment as applied to the print media. . . .

Red Lion and its illumination of the unique status of broadcasting under the First Amendment is ignored.

Further, the agency's approach, as affirmed by the court below, would invalidate not just fairness but the entire public interest regulatory scheme at renewal. The agency's policy at renewal is to require broadcasters to present issue-oriented programming serving the needs of their community.[20] But just as in the case of fairness, the FCC could claim that this requirement constitutes "governmentally-coerced speech" that interferes with the editorial discretion of broadcasters (who might not want to present such programming) and that the print model (*Tornillo*) should govern at renewal.

II. The 1959 Amendment to Section 315(a) codifies the fairness doctrine.

The Court of Appeals decision is predicated on the holding in *TRAC*, *supra*, that the fairness doctrine is not statutorily mandated. The *TRAC* decision conflicts with the Seventh Circuit's holding in *Maier* v. *FCC*, 735 F.2d 220, 225 n.4 (7th Cir. 1984).[21]

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[20]See *Office of Communication of the United Church of Christ* v. *FCC*, 707 F.2d 1413, 1426-30 (D.C. Cir. 1983).

[21]See also *CBS* v. *DNC*, *supra*, 412 U.S. at 110, n.8, 113, n. 12; *Straus Communications, Inc.* v. *FCC*, 520 F.2d 1001, 1007, n.11 (D.C.Cir. 1976); *NCCB* v. *FCC*, 567 F.2d 1095, 1107 (D.C. Cir. 1975), *cert. denied*, 436 U.S. 926 (1978); *Green* v. *FCC*, 447 F.2d 323, 327, n.6 (D.C. Cir. 1971). *Cf. PIRG* v. *FCC*, F.2d 1060, 1066 (1st Cir. 1975).

We have shown that the public interest standard of the 1934 Communications Act mandates a bedrock fairness requirement. Here we urge that contrary to the holding of the court below in reliance upon the *TRAC* case,[22] the 1959 amendment to Section 315(a) codified the fairness doctrine, and thus also precludes the action of the FCC and the court below.

In that amendment, Congress specifically recognized that the public interest standard of the 1934 Act embodies the bedrock fairness obligation, when in exempting from the equal time requirements certain news and news-related programs, it added the proviso that

> ...Nothing in the foregoing sentence shall be construed as relieving broadcasters from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

Congress thus deliberately linked the public interest requirement with the two-fold fairness obligation — to cover public issues, and to do so fairly. The entire thrust of the proviso is that the two are integrally linked, as we have shown in Point I.[23]

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[22]Judge Bork's opinion was joined by then Judge Scalia, with Senior Judge MacKinnon dissenting. A suggestion for rehearing *en banc* was denied in *TRAC* on December 16, 1986, with two judges not participating and five judges of the nine participating voting for rehearing *en banc*. See *TRAC*, *supra*, 806 F.2d at 1115.

This Court denied the petition for *certiorari* filed in *TRAC*, but we point out that the opposition relied heavily on several procedural matters militating strongly against the grant (*e.g.*, that the ruling was made in the teletext area and the FCC had a pending proceeding to determine what action should be taken overall; that Congress also had pending legislation). See Opp. of the United States in *TRAC* v. *FCC*, Case No. 86-1371, Oct. Term 1986.

[23]The majority in *TRAC* rested its holding that the statute does not require

continued on next page

This view is affirmed by *Red Lion*, where the Court stated that the above quoted language

> ...makes it very plain that Congress, in 1959, announced that the phrase "public interest," which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial issues. In other words, the amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard. Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction. 395 U.S. at 380-81 (footnote omitted).

The legislative history, ignored in the *TRAC* opinion, is to the same effect.[24]

Both houses of Congress have expressed their disagreement with the holding in *TRAC*. In its 1987 House Report, *supra*, the House Committee on Energy and Commerce stated that (at 5)

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fairness almost entirely upon the use of the word "under" in Section 315, concluding that it "suggested" merely an authorization to the Commission. 801 F.2d at 518. But the parallel use in the amendment of "under" with reference to the obligation to operate in the public interest "and" the obligation to present conflicting views on public issues plainly means that in this context, "under" means "by." It cannot be suggested that the former obligation is not imposed "by" the Act. Further, a common meaning of "under" is "required by." Webster's Third New International Dictionary (1981 ed.), p. 2487.

[24]See S. Rep. No. 562, 86th Cong., 1st Sess., at 8-9, 13 (1959) (referring to the obligation under "existing law" to "operate in the public interest and ... [present] important policy issues fairly ..."); H. Rep. No. 1069, 86th Cong., 1st Sess., at 5 (1959) (language in 315(a) "is a restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934"); see statements of the bill's managers at 105 Cong. Rec. 17778, 17830-31, as to the binding effect of the amendment.

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> The Committee believes the Court of Appeals decision [in *TRAC*] wrongly interpreted the 1959 amendments and that the Congress did explicitly place the Fairness Doctrine in the Communications Act at this time. The Committee urges the U.S. Supreme Court to reverse the lower court's holding.

The Senate Commerce Committee used essentially identical language in its 1987 Report, *supra*, at 3.[25]

III. Red Lion continues in point as to the constitutionality of the fairness doctrine, including the alleged chilling effects.

The FCC relied heavily upon its finding that "the doctrine's overall net effect [was] to reduce the coverage of controversial issues." 2 F.C.C. Rcd at 5050, App. 237a. But if the bedrock doctrine is statutorily required (Points I and II), the FCC lacked authority to eliminate it,[26] whatever the claimed chilling effects. It could of course consider such effects in determining the most appropriate way to implement the bedrock doctrine. *Cf.* majority opinion below, App. 25a-26a.

The finding is germane to the constitutional issue. See *Red Lion*, *supra*, 395 U.S. at 392-93. But *Red Lion* continues in point and confirms the constitutionality of the doctrine.

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[25]The Senate passed S.742, The Fairness in Broadcasting Act of 1987, by a vote of 59-31. 133 Cong. Rec. S5232 (daily ed. April 21, 1987). The House passed identical legislation by a vote of 302-102. 133 Cong. Rec. H4159 (daily ed. June 3, 1987). On June 19, 1987, President Reagan vetoed S. 742, on the same grounds as the FCC's 1985 *Fairness Report*. 23 Weekly Comp. Pres. Doc. 715 (June 29, 1987); see also H. Rep 101-153, 101st Cong., 1st Sess. (1989).

[26]See *Johnson* v. *Robison*, 415 U.S. 361, 368 (1974).

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Red Lion found that "the fairness doctrine in the past has had no such overall effect" (*i.e.*, "the net effect of reducing rather than enhancing" coverage of public issues). 395 U.S. at 393. That remains the case today. It is not just that we strongly dispute the FCC's conclusion, as based on flawed use of self-serving anecdotal material and squarely contradicted by prior FCC reports and present expert Congressional reports.[27] *Most significantly, the court below did not sustain this finding*. See *supra*, at 14; App. 24a-25a. The issue thus remains today just as "speculative" (*Red Lion*, 395 U.S. at 393).

Even assuming that it were not, *Red Lion* points out that the FCC could take effective action "to insist that [broadcasters] give adequate and fair attention to public issues" (*id.*) by implementing the first prong of the doctrine. The FCC must concede that the first prong is constitutional since it closely resembles the Commission's present policy of requiring community issue-oriented programming.[28] And it can clearly be implemented effectively, for example, by adopting the same procedure —

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[27]In 1974, after two years of full comment and study, the FCC, under Chairman Richard Wiley, found "no credible evidence" that the doctrine had a net effect of reducing coverage. *Fairness Report*, *supra*, 48 FCC2d at 8. This conclusion was reaffirmed in 1979. *1979 Fairness Report*, 74 F.C.C.2d 163, 170 (1970), *recon. denied*, 89 F.C.C.2d 916 (1982). The expert subcommittees in both houses recently came to the same conclusion. See 1987 House Report, *supra*, 20-25; 1987 Senate Report, *supra*, at 28-32. This is not surprising, since as even the FCC itself acknowledges in its present decision, the doctrine simply represents "sound journalism." See *Syracuse Peace Council*, *supra*, 2 F.C.C.2d Rcd at 5056-57, App. 273a.

[28]Indeed, the Commission argued that "...retaining both obligations would be duplicative." *Syracuse Peace Council*, 2 F.C.C. Rcd at 5048; App. . The court below, however, found that the provisions, while similar, are not duplicative because community issue-oriented programming need not be coverage of controversial issues of public importance. Concurring Op. of Judge Starr, App. 71a-72a; dissenting op. of Chief Judge Wald, App 35a-37a.

requiring each broadcaster to set out an illustrative list of programs constituting the "most significant treatment" of such controversial issues.[29]

Incredibly, the Commission eliminated the first prong, the very measure this Court pointed to as the cure to any potential problems. But in light of *Red Lion*, it cannot be seriously argued that the fairness doctrine is unconstitutional because of some "net effect" of reducing coverage when the agency so clearly has within its authority an effective means of preventing any such net effect.

As shown (*supra*, at 10-11; n.12), *Red Lion* governs the scarcity argument since it is undisputed that many more people want to broadcast today than there are available frequencies or channels. In this connection, the FCC purports to follow *Red Lion* and urges overruling the spectrum scarcity base of *Red Lion* only as *dictum*.[30] But it holds the doctrine to be unconstitutional on the ground that it "...imposes substantial burdens upon the editorial discretion of broadcast journalist and ... technological developments [media abundance] have rendered the doctrine unnecessary to ensure the public's access to viewpoint diversity... ."[31] *This means that overall numbers of media outlets renders nugatory spectrum scarcity* — that *Red Lion*, far from being followed, is overruled by the agency, and the entire public

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[29]See *Office of Communication of the United Church of Christ v. FCC*, 779 F.2d 702, 714 (D.C. Cir. 1985).

[30]See *Syracuse Peace Council, supra*, 2 F.C.C. Rcd at 5052-5057, 3 F.C.C. Rcd at 2040 n.22 (App. 247a-277a, 286a-287a). Former FCC Chairman Fowler has stated that television is just a "toaster with pictures." *Television Digest*, March 7, 1988, at 2.

[31]*Syracuse Peace Council, supra*, 2 F.C.C. Rcd at 5052; App. 246a. The Commission relies upon *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984), but that case reaffirms and relies upon the public trustee/fairness concept. See 468 U.S. at 392.

trustee scheme — equal time requirements for candidates for public office,[32] reasonable access for candidates for Federal office,[33] and the requirement that broadcasters render community issue-oriented programming (*supra*, at 19) — is unconstitutional since time and again it interferes with editorial discretion in the face of "technological developments" affording diversity without such agency intervention.

IV. Elimination of the first prong constitutes clear error warranting review by this Court.

The Commission cited three grounds for eliminating the first prong. Two judges voted to affirm solely on the ground that with the chilling effect of the second prong removed, broadcasters on their own would provide an adequate amount of controversial issue programming.[34] We urge that this holding constitutes error and in an area of the greatest importance to the public interest.

For the issue is not some global or overall one, but rather whether *every* broadcaster meets its duty to contribute to an informed electorate on public issues — what has been described by the FCC in 1974 as "the single most important requirement of operation in the public interest."[35] Some number of broadcasters

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[32]Indeed, *Red Lion* makes clear that fairness and equal time are integrally related, and "in terms of constitutional principle ... are indistinguishable ... ." (395 U.S. at 391; 382-83). See also *Branch* v. *FCC*, 824 F.2d 37, 49-50 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 1220 (1988).

[33]See Section 312(a)(7), 47 U.S.C. 312(a)(7); *CBS, Inc.* v. *FCC*, 453 U.S. 367 (1981).

[34]See App. 30a-31a; concurring op. of Judge Starr, App. 71-72a; dissenting op. of Chief Judge Wald, App. 35a; see n. 28.

[35]*Fairness Report*, *supra*, 48 F.C.C.2d at 10.

(*e.g.*, entertainment video formats, home shopping, music formats) can now eschew all coverage of controversial issues, with no policy at renewal to deter such conduct. As Chief Judge Wald's dissent cogently demonstrates (App. 41a), the FCC simply wanted to rid itself of the entire doctrine, and therefore did so, without any basis or proper notice.

CONCLUSION

The issues before the Court are of the greatest importance to the operation of Title III of the Communications Act and indeed, to the nation in light of the dominant role played by broadcasting in forging public opinion on controversial issues. As stated, Congress certainly so regards the issues, and is moving again (*supra*, at 18, n.25) to enact fairness legislation.[36] In this connection, we respectfully suggest that this Court not consider this petition until mid-October when it will be known whether or not such legislation has been enacted into law. If enacted, it would, we believe, render moot the need to consider the petition.[37] If not, it would leave this most important legal issue solely for resolution by this Court.

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[36]Such legislation has been included in the "Proposed Budget Reconciliation Provisions of the Committee on Energy and Commerce," Subtitle H; Section 4702, 101st Cong., 1st Sess., and, if retained in this form, would be before the President in early October. See *Broadcasting Mag.*, July 17, 1989, at 27. See also H.R. 315, 101st Cong., 1st Sess.; H. Rept. No. 101-103, 101st Cong., 1st Sess. (1989).

[37]We believe that fairness legislation, if enacted into law, would compel the Commission to adhere to the doctrine and thus to issue an order reinstating the finding of a fairness violation by Meredith. The latter, being aggrieved, could seek review of the constitutional issue. Since the issue has been fully briefed, such review could be on an expedited basis.

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89-312

No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

SYRACUSE PEACE COUNCIL, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

APPENDIX

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 13, 1988 Decided February 10, 1989

No. 87-1516

SYRACUSE PEACE COUNCIL, et al., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA, RESPONDENTS

MEREDITH CORPORATION,
CBS, INC.,
RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION,
AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
DEMOCRATIC NATIONAL COMMITTEE,
NATIONAL BROADCASTING CO., INTERVENORS

No. 87-1544

HENRY GELLER and DONNA LAMPERT, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA, RESPONDENTS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

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MEREDITH CORPORATION,
NATIONAL ASSOCIATION OF BROADCASTERS,
NATIONAL BROADCASTING COMPANY, INC.,
CBS, INC.,
RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION,
AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
FREEDOM OF EXPRESSION FOUNDATION,
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
INTERVENORS

Petitions for Review of an Order of the
Federal Communications Commission

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Andrew Jay Schwartzman, with whom *David W. Danner* was on the brief, for petitioner Syracuse Peace Council. *Earle K. Moore* also entered an appearance for petitioner Syracuse Peace Council, et al.

Angela J. Campbell, Yolanda Gallegos and *Robert T. Perry* were on the brief for petitioner Office of Communication of the United Church of Christ. *Michael Botein* also entered an appearance for petitioner Office of Communication of the United Church of Christ.

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Floyd Abrams, with whom *Dean Ringel*, *Michael H. Bader*, *John M. Pelkey*, *Melodie A. Virtue* and *Thomas G. Fisher* were on the brief, for intervenor Meredith Corporation.

Howard Monderer, *Molly Pauker* and *Corydon B. Dunham* were on the brief for intervenor National Broadcasting Company, Inc.

Charles D. Ferris, *Bruce D. Sokler* and *James A. Kirkland* were on the brief for intervenors Democratic National Committee.

Phillip Heymann, *Yoland Gallegos*, *Don Simon* and *Mark E. Chopko* were on the brief for amici curiae, Common Cause, et al., urging reversal. *Phillip H. Harris* also entered an appearance for amici curiae, Common Cause, et al.

Philip H. Hecht was on the brief for amicus curiae, People for the American Way, urging reversal. *Jan G. Levine* also entered an appearance for amicus curiae, People for the American Way.

David W. Danner entered an appearance for amicus curiae, Safe Energy Communications Council, et al.

Before: WALD, *Chief Judge*, and STARR and WILLIAMS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

Opinion concurring in part and dissenting in part filed by *Chief Judge* WALD.

Concurring opinion filed by *Circuit Judge* STARR.

WILLIAMS, *Circuit Judge*: Under the "fairness doctrine," the Federal Communications Commission has, as its 1985 Fairness Report explains, required broadcast media licensees (1) "to provide coverage of vitally important controversial issues of interest in the community served by the licensees" and (2) "to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues." *Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143, 146 (1985). In adjudication of a complaint against Meredith Corporation, licensee of station WTVH in Syracuse, New York, the Commission concluded that the doctrine did not serve the public interest and was unconstitutional. Accordingly it refused to enforce the doctrine against Meredith. Although the Commission somewhat entangled its public interest and constitutional findings, we find that the Commission's public interest determination was an independent basis for its decision and was supported by the record. We uphold that determination without reaching the constitutional issue.

I.

In the summer of 1982 Meredith ran a series of advertisements over WTVH arguing that the Nine Mile II nuclear power plant was a "sound investment for New York." Syracuse Peace Council complained to the Commission that Meredith had failed to give viewers conflicting perspectives on the plant and had thereby violated the second of the fairness doctrine's two requirements.

In its initial decision the Commission agreed with Syracuse that Meredith had failed to fulfill its obligations under the doctrine and demanded that the station within 20 days give notice of how it planned to meet those obligations. *Syracuse Peace Council*, 99 F.C.C.2d 1389, 1401 (1984).

Meredith filed a petition for reconsideration in which it argued that the fairness doctrine was unconstitutional. Meredith Reply to Opposition and Petition for Reconsideration and Supplement, April 12, 1985, at 11-41, Joint Appendix in Case No. 85-1723 at 261-91. Before ruling on Meredith's petition, the Commission completed its 1985 Fairness Report, the culmination of a separate inquiry into both the wisdom and constitutionality of the fairness doctrine. *Inquiry into Alternatives to the General Fairness Obligations of Broadcast Licensees*, 102 F.C.C.2d 143 (1985).

On the issue of whether the doctrine continued to promote the public interest, the 1985 Report said that the Commission was "firmly convinced that the fairness doctrine, as a matter of policy, disserves the public interest . . ." 102 F.C.C.2d at 148. See also *id.* at 147 (similar); *id.* at 246 (language identical to that quoted). In reaching that conclusion the Commission invoked essentially the same grounds as it has in the present action—chiefly, that growth in the number of broadcast outlets reduced any need for the doctrine, that the doctrine often worked to dissuade broadcasters from presenting *any* treatment of controversial viewpoints, that it put the government in the doubtful position of evaluating program content, and that it created an opportunity for incumbents to abuse it for partisan purposes. Despite all this, it declined to eliminate the doctrine, expressing concern that it might be statutorily mandated. *Id.* at 148.

The 1985 Report also raised serious doubts about the continuing constitutionality of the fairness doctrine, but, saying that it was "the province of the federal judiciary —and not this Commission—to interpret the Constitution," 102 F.C.C.2d at 155, the Commission refused to make a constitutional ruling.

After issuing the 1985 Report, the FCC in due course considered Meredith's petition for reconsideration. In

that context it again refused to address the constitutional issue—not on the ground that Meredith had raised the defense belatedly but solely on the theory that that issue should be left to Congress and the courts. It invoked its 1985 Report in support of this view. *Syracuse Peace Council*, 59 Rad.Reg.2d 179, 182 n.4.

On appeal, this court reversed and remanded the case to the Commission. *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987). We noted the principle that regulatory agencies cannot invalidate an act of Congress, see *Johnson v. Robison*, 415 U.S. 361, 368 (1974), but said that an agency could not blind itself to a constitutional defense to a "self-generated" policy. 809 F.2d at 872. In the meantime, we observed, this court had in another decision found that the fairness doctrine was *not* mandated by statute. *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, *reh'g en banc denied*, 806 F.2d 1115 (D.C. Cir. 1986) ("TRAC"), *cert. denied*, 107 S. Ct. 3196 (1987). See 809 F.2d at 873 n.11. Thus on remand the Commission would have to resolve Meredith's constitutional defense, *unless* it determined in light of the 1985 Report that enforcement of the doctrine was contrary to the public interest. *Id.* at 874. We explicitly noted that the 1985 Report had concluded that indeed the doctrine no longer served the public interest standard of the Communications Act, see *id.* at 867, and that in the Report the Commission had "largely undermined the legitimacy of its own rule" and "eviscerate[d] the rationale" for the doctrine, *id.* at 873.

On remand, the Commission expanded the scope of the Meredith proceeding by soliciting comments from the public on the general questions whether "in light of the 1985 Fairness Report, enforcement of the fairness doctrine is constitutional and whether enforcement of the doctrine is contrary to the public interest." *Syracuse Peace Council*, 52 Fed. Reg. 2805, 2805 (Jan. 27, 1987). In its Memorandum Order and Opinion in *Syracuse*

Peace Council, 2 F.C.C.Rcd. 5043 (1987), *recon. denied*, 3 F.C.C.2d 2035 (1988), the Commission ruled in favor of Meredith.

The FCC relied heavily on the conclusions drawn in the 1985 Fairness Report, and in fact incorporated that Report into the record and "reaffirm[ed] [its] findings and conclusions." See 2 F.C.C.Rcd. at 5066 n.120. After reciting and endorsing the 1985 Fairness Report's conclusions, the Commission declared that "the fairness doctrine chills speech and is not narrowly tailored to achieve a substantial government interest." *Id.* at 5057. Consequently, the FCC concluded "under existing Supreme Court precedent, as set forth in *Red Lion* [*Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)] and its progeny, that the fairness doctrine contravenes the First Amendment and thereby disserves the public interest." *Id.*

II.

At no time during the long and intricate proceedings in this case has any party suggested that the fairness doctrine is constitutionally compelled. Nor can it be claimed here, in view of this court's *TRAC* decision, that the doctrine is statutorily mandated.[1] Accordingly, the Commission has the authority to reject the doctrine if it concludes, without being arbitrary or capricious, that it no longer serves the public interest.

The Commission has slightly complicated the issue, however, by asserting that "the policy and constitutional considerations in this matter are inextricably intertwined." 2 F.C.C.Rcd. at 5046. If that were true, we could resolve the case only by addressing the constitutional issue.

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[1] Thus the claim of some parties that the Communications Act incorporates a public trustee concept that necessarily includes the fairness doctrine is in essence an effort to ask this panel to overturn *TRAC*.

But it is an elementary canon that American courts are not to "pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of." See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). We applied the maxim in this litigation's prior appearance here, *Meredith v. FCC*, 809 F.2d at 870, and it is obviously no less compelling today. Further, if an agency relies on two grounds for a decision, a court may sustain it if one is valid and if the agency would clearly have acted on that ground even if the other were unavailable. *Salt River Project Agricultural Improvement and Power District v. United States*, 762 F.2d 1053, 1060 n.8 (D.C. Cir. 1985); *Communication Workers of America v. NLRB*, 784 F.2d 847, 851 (7th Cir. 1986) (citing *Bowman Transportation v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286-87 (1974)).

Thus, if we are persuaded that the Commission would have found that the fairness doctrine did not serve the public interest even if it had foregone its ruminations on the constitutional issue, we must end our inquiry without reaching that issue. In fact, as we explain in part III, we have no doubt that even in the absence of constitutional problems the Commission would have reached the same outcome. We then turn in part IV to petitioners' objections to the Commission's policy decision, and in part V to issues relating to the Commission's withdrawal of the doctrine's "first prong," the requirement of coverage of controversial issues.

III.

It is quite true that the Commission at the outset of its opinion here asserted that the constitutional and policy issues were "inextricably intertwined," 2 F.C.C. Rcd. at 5046, and at the end suggested that its policy conclusion was a mere consequence of its constitutional one, *id.* at 5057 ("the fairness doctrine contravenes the

First Amendment and *thereby* disserves the public interest") (emphasis added). Those who would have us grasp the constitutional nettle call our attention to these references. See Intervenor Democratic National Committee Reply Brief at 4-6.

But the Commission's reasoning behind its "intertwining" assertion belies any inference that its policy judgment *depends* upon its constitutional view. It first set forth two overlapping points—that "First Amendment considerations are an integral component of the public interest standard" and that "the promotion of First Amendment values was the Commission's core policy objective in establishing and maintaining the doctrine." *Id.* at 5046. Insofar as these observations state that the same values are relevant to both constitutional and policy issues, they seem unexceptionable. Surely both decisions encompass the goals of stimulating fair, balanced, and diverse treatment of controversial issues (either by single stations or by the media in the aggregate); of minimizing any chilling effect that may flow from governmental requirements that one sort of presentation be matched by another; and of minimizing the risks of abuse and other adverse effects that may flow from having governmental officials sit in judgment on editorial decisions. But it plainly does not follow from this congruity of values that the Commission can make a policy finding against the fairness doctrine only by relying on constitutional grounds.

Quite the reverse. Indeed, the Commission's third argument for "intertwining," namely that in resolving broadcast-related constitutional issues courts "have found our perspective informative," see 2 F.C.C.Rcd. at 5046, pinpoints a clear distinction. In making a public interest judgment under the Communications Act,[2] the Commis-

[2] The Commission imposes a continuing obligation on licensees to operate "in the public interest" via its power under 47 U.S.C. § 312(b) to issue cease-and-desist orders for

sion is exercising both its congressionally-delegated power and its expertise; it clearly enjoys broad deference on issues of both fact and policy. See, e.g., *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981). Its role in constitutional judgments, while uncertain, is more limited. Its fact-findings have some force. *Compare Columbia Broadcasting System. Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1973) ("[I]n evaluating the First Amendment claims of respondents, we must afford great weight to the decisions of Congress and the experience of the Commission") *with id.* at 103 ("That is not to say we 'defer' to the judgment of the Congress and the Commission on a constitutional question, . . . The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem"). As Judge Starr suggests, that force may depend on whether the agency has rejected or upheld the constitutional claim. See separate opinion of Judge Starr at 14-16. But an ultimate constitutional decision on the doctrine necessarily melds raw facts with First Amendment value judgments, compare below at 22-24, and that melding process is for the courts.

Thus, under the legal framework within which the Commission and the courts operate, the overlap of values could not compel the Commission to rest its policy judgment on some supposition about the fairness doctrine's constitutional status.

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failing to operate substantially as set forth in their licenses. The Supreme Court has made clear that the Commission's authority to require continued operation "in the public interest" may be either explicit in the conditions of license issuance or implicit in the FCC's authority under 47 U.S.C. § 312(a)(2) to revoke a license for conditions that would justify denial of an initial license, coupled with the statutory requirement that the public interest be served in granting and renewing licenses, *id.* at §§ 307(a) and (d). See *Red Lion*, 395 U.S. at 372 n.3.

Of course, if the Commission had written its opinion in purely constitutional terms, we would have no choice but to address the constitutional issue or—more likely—to remand to the Commission for it to re-arrange horse and cart. We doubt that *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1977), would bar this court from such a remand. Compare separate opinion of Judge Starr at 10-11. While *Vermont Yankee* makes clear that a reviewing court is not "to impose upon the agency its own notion of which procedures are 'best,'" *id.* at 549, we do not read it as saying that an agency can maneuver a court into a constitutional decision simply by vaulting over its statutory mandate to define and pursue the public interest. If courts may not resist such maneuvers, then an agency (unlike Congress) may put a hypothetical question to the courts: "If we were inclined to enforce the fairness doctrine (which we don't think we are, but we can't make up our minds), could we do so?"

Happily the Commission's opinion is not written in exclusively constitutional terms. First, its intermediate conclusions, if accepted, compel a finding that the doctrine fails to serve the public interest. Most notably, in summarizing its basis for concluding that the doctrine violated the Constitution even under *Red Lion*'s view of the permissible scope of government control of broadcasters, it said:

> In sum, the fairness doctrine in operation disserves both the public's right to diverse sources of information and the broadcaster's interest in free expression. Its chilling effect thwarts its intended purpose, and it results in excessive and unnecessary government intervention into the editorial processes of broadcast journalists.

2 F.C.C.Rcd. at 5052. It is hard to imagine any mental gymnastics by which the Commission, having delivered

itself of such a condemnation, could go on to find the doctrine in the public interest.[3]

In addition, the Commission here adopted the findings of its 1985 Report wholesale. 2 F.C.C.Rcd. at 5066 n.120. As noted above at 5, that Report never reached a conclusion on the constitutionality of the fairness doctrine, but focused explicity and primarily on the Commission's view that the doctrine was detrimental to the public interest. The language of this finding could not have been firmer, and was made by the Commission at three points in the 1985 Fairness Report:

> On the basis of the voluminous factual record compiled in this proceeding, our experience in administering the doctrine and our general expertise in broadcast regulation, we no longer believe that the fairness doctrine, as a matter of policy, serves the public interest.

102 F.C.C.2d at 147; see also *id.* at 148, 246. As we observed in *Meredith*, the 1985 Report "largely undermined the legitimacy" and "eviscerate[d] the rationale" for the doctrine. 809 F.2d at 873. The Commission's incorporation of the Report's reasoning here confirms our conclusion that the Commission would have made the same public interest finding if it had approached the issue free of "intertwining."[4]

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[3] In his separate opinion, Judge Starr suggests at 9 that the Commission has "view[ed] the public interest as driven by First Amendment values (when other[s] . . . were available) . . . ." The Commission's adoption of that view (if that's what it is) does not seem to us to automatically transform a public interest decision based on such variables into a constitutional decision.

[4] Even if all parties chose to frame the issue as exclusively constitutional, see separate opinion of Judge Starr at 13, these litigation strategies would not establish that the Commission had rested its decision exclusively on constitutional grounds. In any event, while it is true that most parties here seek either to condemn or to vindicate the doctrine on con-

IV.

The FCC's decision that the fairness doctrine no longer serves the public interest is a policy judgment. There is no real dispute that fostering fair, balanced and diverse coverage of controversial issues is a good thing. Nor, so far as we can tell from the record or briefs, is there any question that discouraging any coverage at all, having government officials second-guess editorial judgments, or allowing incumbents an opportunity for abuse of power are things to be avoided, all other things being equal. The Commission's problem was to make predictive and normative judgments about the tendency of the fairness doctrine to produce each of these things, about how bad the bad effects were and how good the good ones, and ultimately about whether bad effects outweighed good.

In this situation, we owe great deference to the Commission's judgment. As the Supreme Court has stated,

> [O]ur opinions have repeatedly emphasized that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference. . . . The Commission's implementation of the public-interest standard, when based on a rational weighing of competing policies, is not to be set aside by the Court of Appeals, for "the weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance."

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stitutional grounds, not all do. Petitioner Office of Communication of the United Church of Christ squarely attacks the decision as "arbitrary and capricious." See its opening brief at 2, 10, 11, 40, 46. Moreover, in extended passages of their briefs the parties have been content to discuss the Commission's intermediate conclusions, such as those relating to "chill" or the growth of broadcasting outlets, without confining their analysis to constitutional (as opposed to policy) criteria. See, e.g., Brief of Intervenor Meredith Corporation at 17-22 (passage captioned, "The Explosive Growth of Communications Media Renders the Doctrine Unnecessary").

FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981) (quoting *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 810 (1978)).

The Commission's factual judgments here are almost entirely predictive—statements about the overall effects of a policy on licensees and others. The Supreme Court has observed that "[I]n such cases complete factual support for the Commission's ultimate conclusions is not required since 'a forecast of the direction in which the future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'" *FCC v. WNCN Listeners Guild*, 450 U.S. at 594-95 (internal quotations omitted). Although we do not suppose for a minute that experience without the fairness doctrine will quell dispute—the same problems of measuring the immeasurable will remain—we bear in mind Judge Leventhal's point that for resolution of dispute over "legislative" as opposed to "adjudicative" facts, "a month of experience will be worth a year of hearings." *American Airlines, Inc. v. CAB*, 359 F.2d 624, 633 (D.C. Cir.) (en banc), *cert. denied*, 385 U.S. 843 (1966).

Of course, an agency can act arbitrarily or capriciously in the exercise of a policy judgment, and we must assure ourselves that that did not happen here. The challengers' primary claims are that the supporting evidence was insufficient, that the Commission failed to consider the whole record or to consider alternative solutions adequately, and that its decision in the present case was an arbitrary departure from its 1985 decision to retain the doctrine.

Before addressing those specific attacks, we must describe two core findings of the 1985 Report—that the fairness doctrine often operated to chill broadcaster speech on controversial issues and that recent increases in broadcasting outlets undercut the need for the doctrine—on which the Commission relied heavily in the

present decision. It found that the doctrine produced chilling effects by placing burdens on stations which chose to air numerous programs on controversial issues—including the fear of denial of license renewal due to fairness doctrine violations, the cost of defending fairness doctrine attacks and of providing free air time to opposing views if a fairness violation is found, and the reputational harm resulting from even a frivolous fairness challenge. While the FCC recognized that to a degree the first prong of the fairness doctrine offset this effect by requiring broadcasters to present some controversial issues, it nonetheless found that broadcasters were encouraged

> to air only the minimal amount of controversial issue programming sufficient to comply with the first prong. By restricting the amount and type of controversial programming aired, a broadcaster minimizes the potentially substantial burdens associated with the second prong of the doctrine while remaining in compliance with the strict letter of its regulatory obligations. Therefore, despite the first prong obligation, in net effect the fairness doctrine often discourages the presentation of controversial issue programming.

102 F.C.C.2d at 161.

The 1985 Fairness Report also noted that paradoxically the chilling effect often fell on the expression of unorthodox or "fringe" views on controversial issues. *Id.* at 188. Since the doctrine compelled coverage only of "major" or "significant" opinions, the FCC claimed that in assessing fairness doctrine compliance, the Commission was called upon to evaluate broadcasters' decisions concerning the importance of given viewpoints. The Report expressed its fear that the fairness doctrine thus had the potential "to interject the government, even unintentionally, into the position of favoring one type of opinion over another." *Id.* at 190.

In assessing whether any need for the doctrine persisted, the 1985 Report found a dramatic increase in broadcasting outlets since the 1974 Fairness Report (48 F.C.C.2d 1). This expansion in broadcasting capacity was found to have been spread widely across American society. The FCC found that by 1984 96% of television households received five or more over-the-air (non-cable) television signals, compared with 83% in 1972. 102 F.C.C.2d at 205. Those receiving nine or more signals had tripled, from 21% of TV households in 1972 to 64% in 1984. *Id.* Of course some signals may for one reason or another be unable to function as serious alternative sources. But the new signals are plainly not trivial in the aggregate, as they have driven the networks' audience share down from 90% in 1982 to 76% in 1984. *Id.* at 206.

The Commission also found significant growth in radio outlets since the 1974 Fairness Report. The number of radio stations grew by 30% between 1974 and 1985. The subset of FM service increased during the same period by 60%, leading the FCC to proclaim that "there has also been a fundamental change in the structure of the radio market. Once predominantly an AM only service, radio is now composed of two very competitive services." *Id.* at 203. The Commission noted that radio expansion impacted smaller communities as well as larger urban areas; "the number of radio voices available in each local market has grown." *Id.*

Looking at substitute electronic media such as low power television, video cassette recorders, satellite master antenna systems, and so forth, the Commission found that the gains in radio and television accessibility and diversity actually understated the true development of broadcast media available to the viewing public. *Id.* at 208-17. The Report also noted that print media coverage of controversial issues offered Americans exposure to the type of information which the fairness doctrine was designed to foster.

We now turn to the specific objections to the Commission's conclusions.

Insufficiency of Evidence to Support FCC Position

Although there is some criticism of the 1985 Report's findings as to the growth of access to media signals, that commentary focuses largely on the point that some of the figures used by the Commission may exaggerate the significance of the alternative sources. But the Commission has included the figures on changes in audience shares, clearly reflecting its recognition that not all sources are equal. Some parties also assert that the FCC was overly concerned with aggregate or national figures at the expense of local data. Yet in looking at the Commission's finding concerning the number of households which receive five or more non-cable television signals—a whopping 96%—it seems to us that only a diminutive share of the population has been unaffected by the growth the Commission has recounted. Accordingly, we view these attacks as peripheral.

Several parties, however, have attacked the evidence of broadcaster chill and what they contend is the Commission's failure to respond adequately to the attacks. See *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 46-51 (1983). The United Church of Christ ("UCC") has taken the lead in this, relying in part on critical comments made in 1984 by two groups, Black Citizens for Fair Media ("BCFM") and Media Access Project/Telecommunications Research and Action Center ("MAP/TRAC").

In its present decision the Commission said that the record compiled for the 1985 Report contained "over 60 reported instances in which the fairness doctrine inhibited broadcasters' coverage of controversial issues." 2 F.C.C.Rcd. at 5050. It appears that numerically the main body of evidence comes from the comments submitted to the Commission by the National Association of

Broadcasters ("NAB"), which presented 45 broadcaster accounts of the effects of the fairness doctrine on their industry and policies.[5] It is clear, however, that the FCC also relied on important additional sources, including submissions by some *proponents* of the fairness doctrine. For example, it pointed to evidence from Public Media Center that after it had warned broadcasters that it would demand free response time from stations that accepted advertising on a specific controversy, more than two-thirds of those contacted had refused to sell advertising on the subject at all. 102 F.C.C.2d at 176.

The 1985 Report responded substantially to the BCFM and MAP/TRAC attacks made on the NAB study. 102 F.C.C.2d at 172-88. The FCC defenses took several forms. First, critics argued that the NAB examples should be heavily discounted because the participating broadcasters were "self-interested." *Id.* at 180-82. The FCC noted that because "chill" is a subjective perception, broadcasters' comments provided the best evidence of its existence: "[T]his evidence is more probative than the statements of persons who, by necessity, have to second-guess the broadcasters' state of mind." *Id.* at 181. The Commission also labeled broadcasters' claims of chilling effect "admission[s] against interest," as such confessions could expose broadcasters to potential fairness doctrine attacks. *Id.* Finally, the Commission argued that the critics' argument proved too much: "[T]he identical charge could be leveled against every statement of every commenting party. We have never

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[5] The exact number of examples in the NAB study is subject to dispute, as the BCFM Comments indicate. That group claimed that the NAB study had some accounts which actually incorporated more than one example, while others which were numbered separately actually referred to the same underlying event. BCFM asserted that, when these discrepancies were accounted for, there were 56 examples. BCFM Reply Comments at 55-56, J.A. Vol. II in Case Nos. 87-1516, 87-1544 at 509-10.

held that the evidence of interested parties lack probity; indeed, were we to adopt such a rule it would be virtually impossible for us to come to any conclusions about any issue raised in this proceeding." *Id.* See Jeremy Bentham, 7 *Rationale of Judicial Evidence*, b.9, pt. 3, c.3, p. 393 ff. (Bowring's ed. 1827) ("Any interest, interest of any sort and quantity, sufficient to produce mendacity? As rational would it be to say, any horse, or dog, or flea, put to a wagon, is sufficient to move it. . . .") quoted in 2 *Wigmore on Evidence* § 576 (Chadbourn rev. 1979)). We are persuaded that the self-interested character of the broadcasters' evidence did not bar the Commission from giving it substantial weight.

Second, the FCC responded to BCFM's and MAP/TRAC's allegations that many of the NAB samples were in fact evidence of chill resulting from the political attack rules and the political editorializing rule, rather than from the Fairness Doctrine. *Id.* at 186-87. The Commission observed that evidence of chilling from those rules would logically support an inference that the fairness doctrine tended to chill. Indeed, the logic seems exactly the same: if a rule defines specific conduct as a trigger for obligations, the trigger conduct will be more costly and those subject to the rule will be less inclined to indulge in it. In any event, the FCC also said that "none of the evidence of record demonstrating the existence of a 'chilling effect' that is described in this section involves an application of the personal attack rule or the political editorializing rule." *Id.* at 187 n.157. Thus, we take it that the Commission properly focussed on the evidence directly linked to the fairness doctrine itself.

Third, the Commission made specific rebuttals of some of BCFM's and MAP/TRAC's criticisms of NAB examples.[6] For example, one of the criticisms, twice invoked, was that the particular broadcaster need not have

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[6] *Id.* at 172-73 nn.104-07; *id.* at 174 n.109.

been deterred, since in the view of the critics the station's ordinary news coverage would have satisfied its obligations under the doctrine. In rebuttal, the Commission found the critic's observations highly speculative. See *id.* at 172 n.104 and at 173 n.106. Surely the FCC is right. The fairness doctrine applies to ordinary mortals who adjust their affairs on the basis of estimates of risk. The estimating process costs time and effort. It hardly disproves an alleged deterrent effect to suggest that by more careful research or analysis, or by greater brilliance, the deterred party might have come out the other way.[7] This is typical of this line of critiques, and to avoid repetition we pass on to the remaining attacks.

Fourth, in the 1985 fairness proceeding, BCFM had discounted 33 of the broadcasters' "examples" (out of 56 as recomputed by BCFM, see note 3 above) as (1) merely reflecting broadcaster hostility but not providing "concrete information" (nine cases); (2) in fact evidencing enhancement of information available to the public (six cases); (3) showing no change in broadcast behavior at all (five cases); and (4) reflecting a fairness complaint but no actual chill (11 cases).

UCC appears to be correct in saying that the FCC did not respond directly to these comments, either in the

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[7] It might support an alternative doctrine with more clearly chiselled edges, but no party claims to have presented that alternative in the administrative proceedings. UCC's Brief at 37 n.43 notes the existence of a draft FCC "primer" on the doctrine, prepared in 1981 but never issued, and suggests that its issuance could have been "highly effective at eliminating misperceptions about the . . . doctrine." Having examined the 51-page, singled-spaced document, J.A. (in Nos. 87-1516, 87-1544) at 145-96, we think it far from self-evident that its issuance would have drastically reduced the penumbral chill of the doctrine. Under no circumstances, of course, could it eliminate the non-penumbral chill, i.e., the doctrine's disincentive effects on those who grasped its meaning with perfect accuracy.

1985 Report or the present decision. And if we thought that the Commission's reference to "over 60 reported instances" were intended literally to refer to discrete *episodes* of chilling, we would be troubled by its non-response. In fact, however, it is clear that the Commismission recognized fully that some of the NAB "examples" were not evidence of episodes but were non-episodic evidence of chilling effect. For example, while BCFM lists Example 7 in its first category—mere expressions of broadcaster hostility to the fairness doctrine, see J.A. Vol. II in Case Nos. 87-1516, 87-1544 at 510-11—that example in fact consists of a statement by the general manager of two stations in Durango, Colorado to the effect that the pressures of the fairness doctrine cause her stations to "think twice" about coverage of controversial issues. *Id.* at 424. The evidence was thus of a policy or generic response to the doctrine; the Commission expressly invoked the evidence, using NAB's "example" label, but recognizing it as a policy not an episode. See 102 F.C.C.2d at 175 & n.117. Thus, we think it plain that the Commission was well aware that the NAB "examples" were not all episodes. Moreover, as we look at the NAB "examples" and the BCFM critiques, we are not at all persuaded that the BCFM reclassifications are compelling. Example 7 is not atypical.

Finally, UCC attacks any reliance on the NAB study on the ground that it was "not based on a statistically valid sample of broadcasters' experiences, but rather, was merely a series of anecdotal accounts." UCC Brief at 28. The comment is quite valid, but in the absence of either any statistically valid evidence on the other side, or even a suggestion of how the Commission could have constructed a statistically valid study, we are perplexed as to what the Commission was supposed to have done. Editorial decisions are obviously driven by many factors. Isolation of causes in any scientific way seems virtually impossible. The fairness doctrine has been applicable in one form or another from 1949 until the

present decision, so the Commission could not compare stations' practices under the rule with their conduct free of the rule. (Comparison to practice in other nations would encounter the usual cross-cultural difficulties.)

We note that when speaking of a state-enforced "right-of-reply" applicable to newspapers, the Supreme Court has taken it as self-evident that such a duty "*inescapably* 'dampens the vigor and limits the variety of public debate.'" *Miami-Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974) (emphasis added). See also *Pacific Gas & Electric Co. v. Public Utilities Comm'n of California*, 106 S. Ct. 903, 908 (1986) (citing *Tornillo* to support assumption that California's "[c]ompelled access" to public utility billing envelopes "penalizes the expression of particular points of view"). Of course we recognize that the fairness doctrine differs from the right-of-reply at issue in *Tornillo* and that *Red Lion* applies different constitutional standards to the broadcast media. But we think the Court's approach suggests that where a rule imposes potentially onerous and at least irksome consequences on the exercise of speech, there is nothing very startling about an inference that the rule will often deter speech. We think the Commission could properly find that effect from the evidence before it here.

Failure to Consider Evidence of Doctrine's Beneficent Effects

UCC also charges that the Commission ignored or discounted evidence of the benefits derived from the fairness doctrine. See UCC Brief at 41-46. We think part of the problem here arises out of UCC's apparent assumption that the Commission believed that the fairness doctrine rarely (or never) increased diversity of expression. Indeed, the Commission only purported to find that "the overall *net* effect of the doctrine is to reduce the coverage of controversial issues of public importance," 2 F.C.C.Rcd. at 5050, a finding clearly consistent with a

belief that the doctrine frequently produced its intended effects. We do not read the Commission's focus on the negative aspects as manifesting a blindness to unwelcome evidence but rather as a focus on what it viewed as novel or surprising. To say that a rule has often produced its intended effects is to tell a dog-bites-man story—not front-page stuff. The Commission was naturally more struck by evidence of *un*intended consequences—hardly in the man-bites-dog class, but closer.

In one instance, for example, UCC claims that the FCC twisted some comments which illustrated the efficacy of the doctrine and attempted to use this evidence to show that broadcasters were being chilled as a result of public interest groups' pressure. It points to the Commission's treatment of evidence submitted by the Public Media Center describing an anti-nuclear coalition's campaign to secure free time by invocation of the doctrine. The coalition had indeed asked for and received free time, but it also had invited stations to refuse to sell time and thereby to avoid any fairness problem at all. Over two-thirds pursued that course, whether because of the doctrine or for other reasons. The Commission said this "vividly illustrates the manner in which a complainant can successfully pressure broadcasters into refusing to sell advertising on ballot issues." 102 F.C.C.2d at 176. In the context of this proceeding, we do not read the Commission's characterization as reflecting blindness to the doctrine's positive effects.[8]

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[8] UCC claims that the Commission "completely ignored" comments submitted by the Safe Energy Communications Council giving 25 examples of successful uses of the doctrine. UCC Brief at 42. This is flatly untrue. The Commission expressly considered the Council's comments, 2 F.C.C.Rcd. at 5066 n.139, stating that in light of the evidence gathered in the 1985 Report the Commission remained "convinced that the net effect of the doctrine [was] to inhibit the expression of opinion on important public issues."

We must confess, however, some perplexity at the Commission's insistence that the doctrine's overall net effect [was] to reduce the coverage of controversial issues." 2 F.C.C.Rcd. at 5050. The Commisison was plainly driven by its effort to resolve the issue not only in policy terms but also in constitutional ones, and it expressly characterized the "net effect" as being "in contravention of the standard announced in *Red Lion*." *Id.* The latter indeed said that if in the future it were shown that the fairness and kindred doctrines had "the net effects of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications." 395 U.S. at 393. The Court then proceeded to declare, "[T]he fairness doctrine in the past has had no such overall effect." *Id.* The Court did not explicate the basis for that finding.

We are frankly uncertain how anyone could be sure either way. The definitional problems alone are staggering. How could a court or agency persuasively define standards by which to evaluate the "quality" of coverage? Once it had done so, by what yardstick could it balance quality increments due to broadcasters' responding as intended against quality decrements due to the deterrent effects? The Commission does not explain. Nor do the challengers, who evidently are happy to weigh these unweighables but read the scales differently.

Despite this confusion, we believe we can "discern the path" followed by the Commission. See *Bowman Transportation*, 419 U.S. at 286-89. It found itself confronted with evidence that it read as establishing that the doctrine has very substantial deterrent effects (and, as we have said, we believe that finding was permissible). It also quite plainly made the normative judgment that government decisions on program content and government-forced expressions of ideas, together with the associated risks of partisan abuse, were anathema. See 102 F.C.C. 2d at 190-94; 2 F.C.C.Rcd. at 5050-51, 5055-57. It ex-

plicitly found support for that value judgment in Supreme Court analyses of the First Amendment as applied to parties other than broadcasters, citing *Miami-Herald Publishing Co. v. Tornillo* and *Pacific Gas & Elec. Co. v. Public Utilities Comm'n of California.* See 2 F.C.C.Rcd. at 5057. It was persuaded that the doctrine's deterrent effects were on the same scale as its expression-generating ones, and it plainly discounted the *value* of the latter as "governmentally-coerced speech." *Id.* Accordingly it rejected the doctrine as a matter of policy. That policy judgment seems to us by no means arbitrary or capricious, and indeed quite similar to the Supreme Court's finding of similar value judgments implicit in the First Amendment as applied to the print media. And the Commission's course is not rendered arbitrary or capricious by its choosing, as the Court had in *Red Lion,* to cast its decision in terms of an assessment of the "net effect" of the doctrine.

Failure to Consider Alternatives

Petitioners Geller and Lampert contest the FCC's refusal to adopt their proposed alternative to the elimination of the fairness doctrine. The two have repeatedly urged the Commission to review fairness matters only at license renewal, and to adopt a malice standard for this review.

The FCC has twice declined to return to its pre-1962 practice of resolving fairness doctrine complaints at renewal, first in its 1974 Fairness Report, 48 F.C.C.2d at 17-18, affirmed by this court in *National Citizens Committee for Broadcasting v. FCC,* 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied,* 436 U.S. 926 (1978), and then in its 1987 Alternatives Report, 2 F.C.C.Rcd. 5272, 5276-78. The 1987 Report found that

> although the renewal-only proposals might appear, at first glance, to lessen the degree of immediate, direct and tangible government intrusion into the editorial

> processes of broadcast licensees, in actuality the net effect would be merely to postpone the eventuality of extensive governmental involvement at license renewal time.

Id. at 5278. The Commission noted several specific defects that it perceived in the renewal review plan. First, by linking fairness evaluations with the renewal process, broadcasters would view the potential sanctions as being more threatening than those currently in effect, as loss of license or suspension would be seen as more likely. *Id.* Second, the renewal plan deprives the broadcaster of a contemporaneous ruling on its behavior and chance to quickly rectify any imbalance in its programming. The FCC believed this could make broadcasters more conservative in coverage of controversial issues. *Id.* Finally, it would only delay rather than diminish the government's meddling in the editorial process. *Id.*

Geller and Lampert coupled their renewal-only suggestion with the idea that review would proceed under a "malice" standard such as that of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and with an alternative suggestion that the Commission continue to act case-by-case but under a malice standard. As to the first, the Commission agreed that such a standard would reduce the chilling effect, but judged that reduction inadequate to offset what it believed would be the increased chill from postponement to renewal. 1987 Alternatives Report, 2 F.C.C.Rcd. at 5278. As to the second, the Commission in its reconsideration order in the present case expressed doubt whether a malice standard would substantially reduce the chilling effect when compared with the Commission's practice of deferring to broadcasters' reasonable judgments, 3 F.C.C.Rcd. at 2037, and said that the difference in impact on licensees would be a matter of degree rather than of kind, *id.* at 2038. Although its discussion of the subject is more than usually framed in constitutional terms, we read it as concluding that the

proposals only mildly mitigated the ill effects that drove the Commission to reject the fairness doctrine as previously enforced. That judgment seems well within its discretion, especially as the proposals would also appear to materially diminish the positive effects of the doctrine.

Departure from 1985 Decision

Some parties complain that the present decision represents an unexplained abandonment of the Commission's 1985 decision to persist in enforcement of the doctrine. *Cf. Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 41-44 (1983) (agency changing course required to supply reasoned analysis for the change); *Center for Auto Safety v. Peck*, 751 F.2d 1336, 1343 (D.C. Cir. 1985).

The 1985 Fairness Report had found that the doctrine disserved the public interest, but had refrained from dropping the doctrine on policy grounds only because of concern that perhaps it was statutorily mandated, 102 F.C.C.2d at 227, and because of the intense congressional interest then brewing over the fairness doctrine, *id.* at 246-47. This court's *TRAC* decision removed the first obstacle (except insofar as the Supreme Court might find otherwise); a successful presidential veto of Congress's attempt to mandate the fairness doctrine clearly diminished the second. Though we find no explicit reference to these reasons in the decision under review, they appear so obvious and compelling that a remand to extract the magic words from the Commission would be pure waste. See *Bowman Transportation*, 419 U.S. at 286-89.

V.

Several parties attack the Commission's repeal of the so-called "first prong" of the fairness doctrine—the requirement that broadcasters provide coverage of important controversial issues of interest to the community they serve. First, they contend that they were not ade-

quately notified of the Commission's intent to reconsider the first prong in this proceeding. Second, petitioners argue that the FCC's abandonment of the first prong was arbitrary and capricious.

Notice

We must first explain the relevance of notice. The decision under review has been, up to this point, an adjudication in the classic sense. The Commission disposed of a complaint against Meredith Corporation; its rationale for that decision was that the doctrine under which Meredith had been sanctioned did not serve the public interest (and was unconstitutional). Up to this point we have reviewed the decision as we would any agency adjudication.

The Commission's rejection of the first prong of the fairness doctrine, however, was surely not necessary to its exoneration of Meredith here. No one had ever suggested that Meredith had failed to cover controversial issues; quite the contrary, the whole point was that its coverage was enough to trigger a duty under the second prong. Accordingly, viewing the matter purely as an adjudication, the Commission's statements on the first prong might well be dictum and on that account probably unreviewable. See *Office of the Consumers' Counsel v. FERC*, 808 F.2d 125, 128-29 (D.C. Cir. 1987).

If, however, the Commission complied with the procedural requirements for an informal rulemaking under 5 U.S.C. § 553 (1982), and if it spoke in the dispositive terms that distinguish a substantive rule from a mere policy statement, see *Vietnam Veterans of America v. Secretary of the Navy*, 843 F.2d 528, 535-39 (D.C. Cir. 1988), then its treatment of the first prong constitutes a substantive rule binding the agency and clearly reviewable. There can be no question here that the Commission purported to dispatch the first prong of the doctrine definitively, and the only procedural flaw that opponents assert is the want of notice.

It seems to us clear that the relevant notices reasonably warned interested parties that the Commission was looking at the fairness doctrine as a whole. The Notice of Inquiry leading to the 1985 Fairness Report, 49 Fed. Reg. 20317 (May 14, 1984), said:

> Our purpose in instituting this inquiry is to undertake the *most searching and comprehensive* reexamination of the fairness doctrine that this agency has ever had. Our goal is to obtain as complete a record as possible by inviting comment on *all facets of the fairness doctrine* . . .

Id. at 20318 (emphasis added).

On remand from our decision in *Meredith* the Commission issued a notice telling interested parties of its plan to review the constitutional and public interest underpinnings of the "fairness doctrine." While that notice did not employ the especially sweeping terms used in the Notice of Inquiry, it spoke of the fairness doctrine generally and specifically linked the proceeding to the prior Inquiry:

> [t]he Commission hereby requests comment on whether, in light of the 1985 Fairness Report, enforcement of the fairness doctrine is constitutional and whether enforcement of the doctrine is contrary to the public interest. Although the Commission does not ordinarily seek public comment in an adjudicatory proceeding, because of the general importance of the issues in this particular case, the Commission will entertain comments from all interested members of the public . . .

Order Requesting Comment, FCC 87-33 (Jan. 23, 1987), 52 Fed. Reg. 2805-01 (Jan. 27, 1987).

We believe these provided adequate notice that both aspects were under review.

Whether Rescission of the First Prong Was Arbitrary and Capricious

In explaining its rejection of the first prong, the Commission has argued that the doctrine is a unified whole, so that, once it rejected the second requirement on policy and constitutional grounds, it would be inappropriate to preserve the first. 2 F.C.C.Rcd. at 5048. We regard this as a statement of a conclusion, not a reason, so that if it stood alone we would be compelled to reverse this aspect of the Commission's action. The Commission analogizes its action to that of a court that has held part of a statute unconstitutional and must then consider whether to sever other parts. *Reconsideration Order*, 3 F.C.C.Rcd. at 2038. The analogy only underscores the deficiency of the Commission's "unified doctrine" declaration. In making a severability decision a court essentially inquires what the legislature would have done had it been aware of the infirmity of one part. Here, the Commission was acting both as adjudicator and legislative body, and was thus perfectly free to decide what it wanted. Moreover, even a court making a severability decision tries to explain *why* it believes the legislature would prefer the valid portions of the statute to fall or survive. See, for example, *Bowsher v. Synar*, 106 S. Ct. 3181, 3192-93 (1986).

In other portions of its decision, however, the Commission went on to supply reasons for terminating the first prong. The Commission's vigor in expressing these reasons leaves us no serious doubt that it would have proceeded to end the first prong even if it had recognized that its "unified doctrine" statement was a mere conclusion.

First, removal of the fairness doctrine's second requirement would reduce the need for the coverage requirement. With the chilling effects of the second requirement ended, the Commission expected that "coverage of controversial issues will be forthcoming naturally, without the need for continued enforcement of the first prong."

3 F.C.C.Rcd. at 2038; see also 102 F.C.C.2d at 161 n.66. It viewed the first prong as having originated in part as a "backstop[]" to the second prong, so that removal of the latter removed much of the reason for the former. 3 F.C.C.Rcd. at 2038.

Second, it viewed the coverage requirement as in significant part duplicative of its independent requirement that broadcasters cover issues "of importance" to their communities. 2 F.C.C.Rcd. at 5048.[9] While the FCC acknowledged on reconsideration that the two programming requirements were not identical, it saw sufficient similarity to believe that the community issues rule would fill any material regulatory gap. 3 F.C.C.Rcd. at 2039.

Third, in its discussion of the fairness doctrine as a whole the Commission relied heavily on its view that government involvement in the editorial process was offensive. See 102 F.C.C.2d at 190-94; 2 F.C.C.Rcd. at 5050-52, 5055-57; above at 26. That judgment of course applies to the editorial decisions required for enforcement of the first prong, and the Commission made the point expressly: "[T]he doctrine requires the government to second-guess broadcasters' judgment on such sensitive and subjective matters as the 'controversiality' and 'public importance' of a particular issue. . . ." 2 F.C.C. Rcd. at 5052. It also alluded to the offensive character of government first-prong decisions in distinguishing that part of the doctrine from the community issues requirement:

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[9] The community issues requirement is set out in *Deregulation of Radio*, 84 F.C.C.2d 968, 983 n.36, *recon. denied*, 87 F.C.C.2d 797 (1981), *rev'd in part on other grounds, Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413, 1430-32 (D.C. Cir. 1983); *Commercial TV Stations*, 98 F.C.C.2d 1076, 1092 n.54 (1984), *recon. denied*, 104 F.C.C.2d 358 (1986), *rev'd in part on other grounds, Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987).

> While enforcement of the doctrine's first prong requires the government to judge, on a case-by-case basis, whether a *specific* issue is both controversial and of vital importance to mandate coverage by the broadcaster, enforcement of the issue responsive obligation requires a different level of government intervention in determining, at renewal time, whether broadcasters' *overall* programming covered the needs and interests of its community.

3 F.C.C.Rcd. at 2042 n.67 (emphasis in original). Compare separate opinion of Judge Wald at 6-7 (suggesting that the Commission failed to identify any drawbacks in enforcement of the first prong).

We believe that these reasons, particularly in light of the Commission's background findings on the increased diversity of outlets and programming, adequately support its removal of the first prong.

CONCLUSION

We conclude that the FCC's decision that the fairness doctrine no longer served the public interest was neither arbitrary, capricious nor an abuse of discretion, and are convinced that it would have acted on that finding to terminate the doctrine even in the absence of its belief that the doctrine was no longer constitutional. Accordingly we uphold the Commission without reaching the constitutional issues. The petition for review is denied.

WALD, *Chief Judge*, concurring in part and dissenting in part: I concur in Parts I-IV of Judge Williams' opinion, which uphold the FCC's decision to abrogate the second prong of the fairness doctrine as an exercise of its statutory authority to regulate in the public interest. I dissent, however, from Part V, which sustains the Commission's decision to eliminate the fairness doctrine's first prong, an FCC rule requiring broadcasters to "provide coverage of vitally important controversial issues of interest in the community served by the licensees." *See 1985 Fairness Report*, 102 F.C.C.2d at 146. I believe that this aspect of the Commission's decision is not supported by the record and was not adopted in compliance with the Administrative Procedure Act.

First, the agency failed to provide interested parties with notice, as required by the Administrative Procedure Act, that it proposed to eliminate the first as well as the second prong of the doctrine. I reject the Commission's suggestion that, since an adjudication rather than a rulemaking was involved, no notice was required. *See* Brief for FCC at 42. Of course the FCC has broad latitude to choose between adjudication and notice-and-comment rulemaking in instituting policy changes. But even if an adjudication is the chosen vehicle, the parties at least must be told if a relevant policy is being re-evaluated. *See Eastern Carolinas Broadcasting Co. v. FCC*, 762 F.2d 95, 101 (D.C. Cir. 1985). And certainly an agency cannot be permitted to evade the requirements of notice and comment by using an adjudication as a vehicle for resolving an issue which does not affect the interests of the parties. Here Meredith was not accused of violating the first prong of the fairness doctrine at all; this aspect of the doctrine could therefore be changed only after interested persons were provided with notice and an opportunity to comment.

The FCC did not provide adequate notice of a proposed change in the doctrine's first prong. The Notice of

Inquiry published in the Federal Register stated that "[t]he Commission hereby requests comment on whether, *in light of the 1985 Fairness Report*, enforcement of the fairness doctrine is constitutional and whether enforcement of the doctrine is contrary to the public interest." 52 Fed. Reg. 2805 (1987) (emphasis added). Since the 1985 Report *nowhere* discussed the desirability of abrogating the first prong, interested parties could not have been forewarned that the first as well as the second prong of the fairness doctrine was vulnerable to elimination.

The Commission's position is that any thorough examination of the fairness doctrine would necessarily include an appraisal of the first prong. The Commission argues that reasonable persons reading the Notice of Inquiry should have known that the first prong would be at issue. That argument is belied by the 1985 Fairness Report itself: that Report was billed by the FCC as an exhaustive examination of the doctrine, yet it contained no discussion at all concerning the desirability of retaining the first prong if the second prong were discarded. The FCC's position is further weakened by the fact that its Notice of Inquiry apparently failed to attract any public comment whatsoever concerning the desirability of retaining the first prong if the second were eliminated.[1]

But even if the Commission had provided adequate notice of its intentions, I do not believe that its decision

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[1] I draw this conclusion from the fact that the Commission itself has identified no party who commented on this issue in response to the Notice of Inquiry. It might be the case that those who responded to the Notice were simply uninterested in the survival of the first prong in the event of the second prong's elimination. That hypothesis, however, is belied by the subsequent history of this litigation. Petitioners have argued forcefully to this court that the first prong should be retained even if the second prong is not. *See* Brief for Syracuse Peace Council at 40-49; Brief for Geller and Lampert at 36-40.

could be sustained as reasoned decisionmaking. The FCC has offered three arguments in support of the elimination of the first prong.[2] First, analogizing to principles concerning the severability of statutes, the Commission argued that the fairness doctrine was a unified whole and that one part therefore could not be severed from the rest. Second, the Commission concluded that the obligations imposed by the first prong were comparable to those imposed by the existing duty of broadcasters to cover issues of importance to their communities, *see Deregulation of Radio*, 84 F.C.C.2d 968, 982-83, *recon. denied*, 87 F.C.C.2d 797 (1981), *rev'd in part on other grounds, Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983), and that "retaining both obligations would be duplicative." *Syracuse Peace Council*, 2 F.C.C. Rcd. 5043, 5048 (1987). Finally, the Commission argued that enforcement of the first prong would no longer be necessary: with the chilling effect of the second prong removed, broadcasters would of their own volition cover controversial issues.

The Commission's first two arguments appear flatly contradictory. The agency is arguing both that the first prong makes no sense without the second *and* that it will in essence continue to enforce the first prong under a different authority. If the first prong is desirable only as an adjunct to the second, and if the community issues requirement is substantially equivalent to the first prong, then it is not at all clear why the agency bothers to keep

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[2] These arguments, it bears noting, are markedly different from the reasons advanced by the Commission as justification for repeal of the second prong. The FCC has not suggested that the first prong, standing alone, would be unconstitutional. Nor could it plausibly be advanced that a naked obligation to cover controversial issues would by itself chill broadcaster speech.

the community issues rule on the books at all.[3] Leaving this incongruity aside, however, the Commission's three arguments do not, in my view, meet the threshold of reasonableness.

As my colleagues recognize, the Commission's analogy to the severability of statutes is misguided. *See* Williams op. at 30; Starr op. at 30. In deciding whether to sever the defective part of a statute, a court inquires into legislative intent: would the enacting body have wished to let the rest of the statute stand without the offensive part? Since the Commission functions as both an adjudicative and rulemaking body, it need not inquire into what some other entity would have decided: it can make the choice for itself. The agency's purported reliance on severability principles is thus merely a reaffirmation of its basic decision not to retain the first prong. It has made no case that it could not, *if it wished*, enforce one prong without the other.

Neither can the Commission's action be justified by reference to the overlap between first prong obligations and the duty to cover issues of importance to the community. While a substantial overlap does exist, the requirements are by no means duplicative.[4] The commu-

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[3] The Commission has stated that the elimination of the first prong does not cast doubt upon the continued vitality of the community issues requirement. It has explained that "although the first part of the fairness doctrine may overlap with . . . the issue responsive programming obligation, we did not intend to suggest that the first part obligation under the fairness doctrine and the duty to air issue responsive programming are identical." *Syracuse Peace Council (Reconsideration)*, 3 F.C.C. Rcd. 2035, 2039 (1988). The FCC's position is that the two requirements are sufficiently similar to make the enforcement of both "duplicative," yet sufficiently different that the elimination of one does not render the other suspect. I do not believe that the agency can have it both ways.

[4] Judge Starr appears to agree on this point. *See* Starr op. at 30-31.

nity issues requirement obliges broadcasters to devote reasonable air time to the coverage of issues important to the local community. The first prong of the fairness doctrine focuses on the broadcaster's obligation to cover *controversial* issues. It seems entirely foreseeable that some broadcasters might provide abundant coverage of community issues generally but might—perhaps from fear of incurring the displeasure of the public or of advertisers—steer clear of issues of a controversial nature. In another proceeding, in fact, the FCC has emphasized the distinction between the two obligations. *See Deregulation of Radio,* 84 F.C.C.2d at 983 n.36. The community issues requirement, in short, imposes obligations which are related to but distinct from the broadcaster's duties under the first prong. The continued viability of the community issues requirement is therefore an insufficient justification for the abrogation of the first prong.

Finally, I am unconvinced by the agency's assertion that the demise of the first prong is justified because, in the absence of the chill produced by the second prong's requirements, broadcasters can be expected to cover controversial issues voluntarily. Certainly the Commission might reasonably conclude that the first prong would become a *less significant* regulatory tool once the second prong had been eliminated. But the FCC has made no argument that, once the second prong is eliminated, the first prong will be *counterproductive.* The FCC's position is in essence that, after the demise of the second prong, *most* broadcasters will not need the incentive provided by the first prong. This seems to me to be plainly insufficient to justify repeal.

Clearly an agency could not justify the promulgation of a new regulation by arguing merely that the rule would not do much harm. The FCC appears, however, to defend the converse of this position: the agency asserts that the first prong may be eliminated simply because, after the second prong's elimination, the first

prong is likely to do little good. The agency's position in this case seems to rest on an implicit distinction between the initiation and the abrogation of rules. That distinction, however, has been flatly rejected by the Supreme Court. "Revocation constitutes a reversal of the agency's former views as to the proper course. . . . In the abstract, there is no more reason to presume that changing circumstances require the rescission of prior action, instead of a revision in or even the extension of current regulation. If Congress established a presumption from which judicial review should start, that presumption . . . is not *against* . . . regulation, but *against* changes in current policy that are not justified by the rulemaking record." *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 41, 42 (1983) (emphasis in original). It was therefore incumbent upon the Commission to establish some plausible basis for believing that the world would somehow be *better* if the first prong were eliminated. The agency made no attempt whatsoever to articulate such a basis.

Of course, in one respect the decision to deregulate may legitimately involve a different calculus from that required for the promulgation of a new rule. An agency making regulatory decisions may take administrative costs into account; consequently, an agency might sometimes justify the abrogation of a rule on the ground that its beneficial effects are small and that these benefits will be outweighed by the costs of its administration.[6] In the present case, however, the Commission neither referred to nor presented evidence of the costs of administering

[6] In *State Farm*, the Supreme Court noted that "the removal of a regulation may not entail the monetary expenditures and other costs of enacting a new standard, and, accordingly, it may be easier for an agency to justify a deregulatory action." 463 U.S. at 42. The Court cautioned, however, that "the direction in which an agency chooses to move does not alter the standard of judicial review established by law." *Id.*

the first prong as a justification for the agency's decision.

The real-world effects of the first prong's demise are difficult to predict. It might be that, with the removal of the second prong, the first prong would have been reduced in significance. On the other hand, the Commission may have overestimated the extent to which market forces will foster programming on controversial issues. This is a predictive judgment on which courts would ordinarily defer to agency discretion. Here, however, the uncertainty concerns only the size of the benefit which the first prong would produce; the agency has failed to identify any costs.[6]

In arguing that the Commission has met its burden of identifying the disadvantages of continued first prong enforcement, Judge Williams relies heavily on the following passage from the agency's opinion on Reconsideration: "While enforcement of the doctrine's first prong requires the government to judge, on a case-by-case basis, whether a *specific* issue is both controversial and of vital importance to mandate coverage by the broadcaster, enforcement of the issue responsive obligation requires a different level of government intervention in determining, at renewal time, whether broadcaster's *overall* program-

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[6] It might also be that stricter enforcement would make the first prong a potent regulatory tool. The agency has adequately explained its view that stricter enforcement of the first prong would not eliminate the chilling effects produced by prong two. It has also predicted that, with the second prong eliminated, *most* broadcasters will cover controversial issues without this regulatory spur. It has not, however, adequately considered the possibility that heightened first prong enforcement might be an effective weapon against those few broadcasters who remain recalcitrant. Although my dissent does not turn on the Commission's failure to give proper consideration to this alternative, I believe that failure underscores the too-casual nature of the agency's treatment of this question.

ming covered the needs and interests of its community." *Syracuse Peace Council* (*Reconsideration*), 3 F.C.C. Rcd. at 2042 n.67 (emphasis in original). *See* Williams op. at 32. The Commission appears to argue that continued first prong enforcement would impose significant regulatory burdens, over and above those imposed by other rules, because case-by-case review of specific programming decisions is a particularly intrusive form of broadcast regulation. For two reasons, however, I believe that this passage fails to support the Commission's decision.

First, the pasage quoted by Judge Williams is flatly inconsistent with other elements of the agency's reasoning. In its Fairness Alternatives Report, the Commission rejected a proposal that enforcement of the fairness doctrine (first and second prongs) take place at renewal time. The FCC asserted that "the chilling effects under a renewal-only approach would be significantly heightened, rather than decreased." 2 F.C.C. Rcd. at 5278. Renewal-time scrutiny, the agency reasoned, would be more intrusive because "the stakes for a violation of the rules would be greatly raised" and because "a broadcaster would be deprived of a contemporaneous ruling on the merits of a fairness complaint." *Id.* I therefore cannot give deference to the Commission's subsequent assertion that contemporaneous scrutiny of particular programming decisions (under the first prong) would be more burdensome than renewal-time review of a station's overall programming (under the community issues requirement).

Moreover, I do not believe that the FCC's obligation to identify the costs of an unwanted regulation could be satisfied by a bare showing that the rule would impinge on broadcasters' editorial freedom. I believe it is still the law that, in the regulation of electronic media, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). I there-

fore believe that it was incumbent on the Commission to identify some plausible chain of events through which a given restriction on editorial discretion could be expected to lead to a reduction in the range or quality of programming available to the public. In explaining its decision to eliminate the fairness doctrine's second prong, the FCC did not emphasize the hardships suffered by broadcasters. Rather, the agency quite properly focused on the ways in which enforcement of the rule might chill controversial speech and thereby adversely affect the range of available programming. But the Commission has made no effort whatsoever to explain how continued enforcement of the doctrine's first prong could induce broadcasters to alter their programming decisions in ways which would ultimately disserve the public interest.

I dissent from the Commission's eradication of prong one because the agency's actions appear to me the very model of arbitrary and capricious decisionmaking. The Commission did not provide interested parties with adequate notice that the first prong was under review. Moreover, the agency has provided absolutely no evidence—indeed, it has not even *asserted*—that the net effect of continued enforcement would be harmful. In fact, the agency has failed to identify *any* deleterious effects whatsoever of continued first prong enforcement. In eliminating prong one along with prong two of the fairness doctrine, the FCC appears to have been motivated primarily by a morbid fear that it might be accused of doing things halfway. This is deregulation running riot.

STARR, *Circuit Judge, concurring*: As my colleagues faithfully recount, this case was launched with the FCC's order holding that Meredith Corporation violated the fairness doctrine. *Syracuse Peace Council*, 99 FCC 2d 1389 (1984). When the case arrived here almost two years ago, a panel of this court held that the FCC had erroneously failed to consider Meredith's contention that the doctrine violated the First Amendment. *Meredith Corp. v. FCC*, 809 F.2d 663 (D.C. Cir. 1987). Our colleagues explained, in emphatic terms, that the FCC could not, consistent with its duty to uphold the Constitution, enforce the doctrine without considering its constitutionality. *Id.* at 874, In particular, consideration of constitutionally based objections was held to be properly within the Commission's purview since, under *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501 (D.C. Cir. 1986), the fairness doctrine represented only an FCC policy, not a statutory requirement.

The upshot was that the *Meredith* panel remanded the case to the Commission with express instructions to consider Meridith's First Amendment claim or to resolve the case on the ground that the fairness doctrine violates the "public interest" standard. *Meredith Corp. v. FCC*, 809 F.2d at 874. Following that remand, the FCC vacated its previous finding that Meredith had violated the doctrine and concluded that "the fairness doctrine contravenes the First Amendment and thereby disserves the public interest." 2 FCC Rcd Vol. 17, 5043, 5057 (1987) ("Order" hereinafter).

Now the case makes its return visit. After elaborate briefing on the constitutional issue resolves by the Commission in conformity with the *Meredith* remand, my colleagues have arrived at the view—urged by no one in the case—that our analysis can properly proceed by, in effect, blue penciling the Commission's language purporting to base the agency's action on constitutional grounds. The majority's methodology of restraint flows, quite un-

derstandably, from the salutary principle that courts must avoid deciding constitutional issues where non-constitutional grounds of decision are available. *See e.g.*, *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1935) (Brandeis, J. concurring). But the applicability of that venerable principle here is very much in doubt. For one thing, we have no statute before us, but only an agency-minted policy which by its very nature implicates the most profound First Amendment interests. For another, the issue comes to us in an administrative law setting with the agency expressly relying upon constitutional considerations and rendering a constitutional judgment. *See SEC v. Chenery Corp.*, 318 U.S. 80 (1942); *see also FPC v. Texaco, Inc.*, 417 U.S. 380, 395-97 (1974); *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 764 (1973). Taken together, the two very different cases of *Ashwander* and *Chenery* teach that a court is to base its review of agency action on non-constitutional grounds if the record reveals that the agency in fact based its decision, either exclusively or alternatively, on such grounds. The agency's analysis must, perforce, shape the contours of the court's consideration.

After reflecting on the effect of *Ashwander* and *Chenery* principles, I cannot, in conscience, subscribe to my colleagues' approach. With all respect to the court's view enunciated today, I am convinced that the record in this case simply will not, fairly read, yield the conclusion that the agency has based the specific decision before us independently on non-constitutional grounds. There is, therefore, no proper basis for skirting the Commission's constitutional analysis (unless we were to conclude, as I do not, that the Commission erred in even considering that issue); in short, the constitutional justifications for the Commission's action must, alas, be considered.

To state briefly the pertinent background: On remand from this court, the Commission based the decision now before us on (1) the adjudicatory record prior to re-

mand, (2) public comments received following remand, and (3) the Commission's 1985 Fairness Report. As the Court's opinion today rightly emphasizes, the 1985 Report reflected an extensive, public-interest inquiry into the current impact of the fairness doctrine. Order at 5043. The Commission then explained its decision as follows:

> The [*Meredith*] court ordered the Commission to consider Meredith's constitutional arguments unless it decided, on policy grounds, not to enforce the fairness doctrine. As we begin to examine the policy issues . . . *it became evident to us that the policy and constitutional considerations in this matter are inextricably intertwined and that it would be difficult, if not impossible, to isolate the policy considerations from the constitutional aspects underlying the doctrine.* We believe, as a result, that it is appropriate and necessary to address the policy and constitutional issues together . . . .

Order at 5046 (emphasis added).[1] The agency's language can scarcely be clearer; in response to the terms of the *Meredith* remand, the FCC expressly declined to avoid the constitutional issue by resolving the case solely on policy (or public interest) grounds.

With that, the Commission then proceeded to engage in an elaborate, First Amendment analysis besed on the Supreme Court's opinion in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Order at 5048-52. The FCC's Order is rooted firmly in *Red Lion*. Wherever one

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[1] The FCC could not have been more explicit in rejecting the validity of a decision based independently on public interest grounds:

> A meaningful assessment of the propriety of the doctrine, therefore, necessarily includes an evaluation of its constitutionality. If the doctrine impedes the realization of First Amendment objectives . . . *a fortiori* it disserves the public interest.

Order at 5046.

looks in the opinion, one sees the FCC wrestling with *Red Lion*. *Red Lion*, it goes without saying, is manifestly not a "public interest" decision; it is a constitutional decision of the first order grounded entirely on the overarching demands of the First Amendment. What the FCC itself characterizes as the "inextricably intertwined" nature of the constitutional-policy inquiry, coupled with what can only be characterized in truth as the FCC's First Amendment mode of analysis, demonstrates beyond peradventure that the agency was examining the fairness doctrine's lawfulness through First Amendment lenses.[2]

It therefore cannot successfully be maintained that the Order is based, either exclusively or alternatively, on public interest grounds. To be sure, as my colleagues understandably emphasize, the Order relies heavily on the FCC's 1985 Fairness Report, in which the Commission concluded that the fairness doctrine violated the public interest standard. *1985 Fairness Report*, 102 FCC 2d 145 (1985). But if the Commission were deciding a public-interest issue alone, without more, all it would have needed to do was dust off and press into service the 1985 Report. Indeed, there is not the slightest hint that the FCC in 1987 viewed its *magnum opus* of only two

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[2] Although I rely (necessarily) on the record for this conclusion, I cannot resist noting *en passant* that both the FCC and attentive Commission watchers have, in other fora, unequivocally viewed the Order as constitutionally driven. *See, e.g., Broadcast Deregulation: The Reagan Years and Beyond*, 40 Ad. L. Rev. 345 (1988). For example, former FCC Chairman Wiley, a lion of the communications bar, stated that the viability of the public trustee concept "was brought to a head by the FCC's most recent and bold action to abolish as unconstitutional the Fairness Doctrine." *Id.* at 350. FCC Chairman Patrick, in reply, recognized that "[o]n a narrow constitutional basis, the Commission applied the *Red Lion* test . . . upon that very narrow constitutional ground and test we found [the fairness doctrine] to be unconstitutional." *Id.* at 356.

years earlier as sufficient to the purpose at hand. Rather, the Commission decided, in light of the *Meredith* remand, to tangle with *Red Lion* itself. There is no escaping this hard, cold fact: in the wake of the generously worded *Meredith* remand, the Commission has rendered a *Red Lion* decision. It has switched gears from three years ago and gone beyond the less heroic, public-interest reach of the 1985 Report.

Now this should come as no surprise to anyone in this courthouse. At the time of the 1985 Report, the Commission was understandably reluctant to cast its conclusions in constitutional terms. The obvious reason for this becoming modesty and restraint was that it had not yet been determined whether the fairness doctrine was indeed codified by the Communications Act. *1985 Fairness Report*, 102 FCC 2d at 155-56. As I see it, any differences between the 1985 Report and the current Order reflect not a shift in the FCC's substantive position, but a sea change in the Commission's authority to articulate its views.[3]

Without fully taking account of the unique legal context surrounding the 1985 Report, the court today relies upon what it views as the Order's "wholesale" incorporation of the 1985 Report to demonstrate that the FCC has in fact rendered a public interest decision. The court ferrets out and features a footnote buried deep in the Order—footnote number 120 to be exact—to buttress

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[3] In 1987, the FCC so explained the different tone of the 1985 Report:

> We believe, however, as we reiterate today, that our analysis of the fairness doctrine in 1985 was in fact informed and driven by First Amendment principles, and with the uncertainty of the doctrine's codification removed, and the *Meredith* court's directive to consider the constitutional issues, we believe it is now incumbent upon us to consider the doctrine in terms of the inextricable constitutional issues upon which the policy rests."

Order at 5062 n.62 (citations omitted).

its position. That humble, but obviously pivotal (to my colleagues) footnote reads:

> We hereby incorporate the findings of the *1985 Fairness Report* into this record and, *as more fully explained below*, reaffirm the findings and conclusions contained in that Report." (emphasis added)

Order at 5066 n.120.

The footnote, in turn, references the following passage:

> We shall thus consider the constitutionality of the fairness doctrine from the perspective both of the public and the broadcast licensees. In so doing, we shall examine the record developed in this case and in the *1985 Fairness Report* [120] to determine, in accordance with existing Supreme Court precedent, whether the enforcement of the fairness doctrine (1) chills speech and results in a net reduction of the presentation of controversial issues of public concern and (2) excessively infringes on the editorial discretion of broadcast journalists and involves unnecessary government intervention to the extent that it is no longer narrowly tailored to meet its objective.

Id. at 5049.

This passage, appearing as it does in a portion of the Order entitled "Constitutional Considerations Under *Red Lion*" scarcely lends support to the conclusion that the FCC based its Order independently on public interest grounds. Indeed, the FCC could not have been more explicit in utilizing the Order only for its factual determinations, in particular the doctrine's chilling effect and impact on editorial discretion, but not for the Report's ultimate conclusion.[4] *See also* Order at 5043 (listing six

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[4] It bears noting that, later in its opinion, the court candidly recognizes that the ultimate conclusion of the *1985 Report* was to *continue enforcement of the fairness doctrine. Maj. Op.* at 27. This fact alone suggests that the Order now under review cannot be read as indiscriminately incorporating the 1985 Report's conclusion.

determinations of the 1985 Report, all of which go to the doctrine's constitutionality).

In short, the record establishes beyond cavil (1) that the FCC based its Order on the premise that the First Amendment questions and public interest issues are "inextricably intertwined" and (2) that the Commission engaged in a *Red Lion* analysis. It follows from *Chenery* that this court is wanting in authority to wave all that pesky constitutional analysis away and pretend that what we have before us, in effect, is the 1985 Report. *Meredith* has unleashed *Red Lion*, and it will not do to pretend, with cheery *bravado*, that *Red Lion* is still secure in its pre-*Meredith* cage. *Red Lion* is now out on the streets, released by a deliberate and careful FCC decision.

For its part, the court airily treats this as just another case coming out of yet another agency here in town charged with making yet another broad public interest determination. This will not do. What is going on, with all respect, is a fundamental administrative law no-no. *Chenery* is, after all, not a prudential doctrine designed to facilitate judicial review. To the contrary, *Chenery* helps maintain the proper spheres of court and agency as ordained by the Administrative Procedure Act, 5 U.S.C. § 706 (1985):

> If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.

SEC v. Chenery Corp., 318 U.S. at 88.

Where, as here, Congress has committed the determination of the public interest to the FCC, "[i]t is not

for us to determine independently what is 'detrimental to the public interest' . . . The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act." *Id.* at 94 (citations omitted); *see also I.C.C. v. Brotherhood of Locomotive Engineers*, 107 S.Ct. 2360, 2368 (1987) (court "may not affirm on a basis containing any element of discretion—including discretion to find facts and interpret statutory ambiguities—that is not the basis the agency used, since that would remove the discretionary judgment from the agency to the court").

In sum, the public interest standard should not be reified as a brooding omnipresence that, notwithstanding both the adjudicatory record and the FCC's explicit reliance on a *Red Lion* (constitutional) analysis, remains ever available to the judiciary as an independent ground of decision. Where, as here, the agency's policy judgment is wholly driven by its constitutional reasoning and conclusions, the reviewing court is obliged to analyse the case in those terms.[5] The approach followed today, I believe, conflates the court's function with the agency's prerogative of giving reasoned content, consistent with constitutional norms, to a statutory standard and thus inadvertently does violence to the basic framework of the modern administrative state.

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[5] The court's position is essentially that, because public interest and First Amendment values "overlap," there *must* be sufficient basis in the Order for affirmance solely on public interest grounds. Maj. Op. at 9-10. The court refuses to recognize that the Order does not contain an "in the alternative" determination that the fairness doctrine contravenes the public interest. Rather, the FCC has engaged in a *Red Lion* analysis and concluded that, as the fairness doctrine violates the First Amendment, *a fortiori* it disserves the public interest. It is in this sense that the public interest decision is a tag-along, driven entirely by the constitutional analysis.

The court's stated basis for avoiding *Chenery's* dictates, it appears, is that we can compel the FCC to analyze the public interest in other than constitutional terms: "[I]f the Commission had written its opinion in purely constitutional terms, we would have no choice but to address the constitutional issue or—more likely—to remand to the Commission for it to rearrange horse and cart." Maj. Op. at 11. I think not. Under governing standards,[6] the Commission's decision to view the public interest as driven by First Amendment values (when other considerations, *e.g.*, broad notions of broadcasters as public trustees, were available) is eminently reasonable. The FCC has never wavered from justifying the fairness doctrine, instrumentally, by reference to the fostering of First Amendment values. *See, e.g., Fairness Report in Docket No. 19260*, 48 F.C.C.2d 1, 4-7 (1974); *Editorializing by Broadcast Licensees*, 13 FCC 1246, 1256-57 (1949); *Great Lakes Broadcasting Co.*, 3 F.R.C. Ann. Rep. 32, 33 (1929); *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. denied*, 288 U.S. 599 (1933). This view, moreover, has been repeatedly endorsed by the Supreme Court. *See, e.g., FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984) (the thrust of broadcast regulation "has generally been to secure the public's First Amendment interest in receiving a balanced presentation of views . . ."); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978)

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[6] As the fairness doctrine itself is not required by statute, *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501 (D.C. Cir. 1986), the Commission's decision to view the public interest in First Amendment terms is subject only to limited review. Specifically, the FCC's position as to the public interest must not be "so implausible that it could not be ascribed to a difference in view or the product of agency expertise," *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), and must evince "a rational connection between the facts found and the choice made." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

("the public interest standard necessarily invites reference to First Amendment principles"); *Columbia Broadcasting System v. Democratic National Comm.*, 412 U.S. 94, 122 (1973) (same); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375 (1969) (fairness doctrine is permissible because it enhances rather than abridges freedom of speech). Indeed, the Supreme Court has expressly invited the FCC to examine whether the constitutional underpinnings of the doctrine remain viable. *FCC v. League of Women Voters*, 468 U.S. 364, 377 n.11 (1984). In view of the fairness doctrine's unique, constitutionally-charged history, it is hardly unreasonable for the FCC to view the public interest through First Amendment lenses.

Nor is the resulting public interest-First Amendment linkage surprising in view of our Nation's historic skepticism, rooted firmly in law, as to the efficacy (and legitimacy) of governmental efforts to regulate the content of speech. There is simply nothing novel about the FCC's determination that, for purposes of evaluating the fairness doctrine, the public interest is "inextricably intertwined" with the First Amendment. Although a regulatory regime might be hypothesized in which the FCC attempted to promote non-First Amendment goals (*i.e.*, equality values inherent in mandated access provisions) through regulation of broadcasting content, that sort of regime is manifestly not required by the Communications Act, and it is emphatically not an abuse of discretion for the Commission to decline to craft such a regime.

The foregoing satisfies me that a remand to delink that which the agency has viewed as inextricably intertwined would be painfully inappropriate. It would also be a bit cheeky, in light of *Meredith*'s generous terms of remand. In short, the Commission's determination that the public interest is inextricably related to First Amendment values is, I believe, fully consistent with the statute and explained with sufficient clarity and cogency

to constitute a valid exercise of discretion. The fact that the court, informed by *Ashwander* principles, might prefer to review a decision based independently on public interest grounds does not warrant judicial compulsion that the FCC exercise its judgment in that manner. *SEC v. Chenery Co.*, 318 U.S. at 94; *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1977).

Remand would also be inappropriate because there is not the slightest indication that, on yet another remand, the FCC would elect to change its interpretation of the public interest-First Amendment relationship. *Cf. NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766-67 n.6 (1969) ("*Chenery* does not require that we convert judicial review of agency action into a ping-pong game"). These admonitions against futile remands have all the more bite here in view of the explicit authorization that the *Meredith* court gave to an agency decision resting on constitutional grounds. *Meredith v. FCC*, 809 F.2d at 874. It goes without saying that this panel is powerless to revisit our colleagues' earlier handiwork, and even if we could, I for one see no need whatever to take that step.

That brings me to this: the court's discussion of remand, with all respect, misses the mark in concluding that affirmance on public interest grounds is justified because, in the absence of a public interest-First Amendment linkage the Commission would undoubtedly reject the fairness doctrine on policy grounds. Maj. Op. at 11-12. As previously discussed, the relevant point is whether the court may, in effect, create this set of circumstances by ordering the FCC to make a separate and independent public interest determination.[7] This sort of judicial com-

[7] The cases cited by the majority in its treatment of remand are, in this respect, inapposite. Maj. Op. at 8. For example, *Salt River Project Agric. Improvement Power Dist. v. United States*, 762 F.2d 1053 (D.C. Cir. 1985), involved an agency decision that, because of inadequate or erroneous find-

pulsion of an independent agency is not authorized by *Ashwander*, which assumes that a non-constitutional ground of decision is legitimately available. *Cf. Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841-42 (1985) (*Ashwander* requires that the non-constitutional construction relied upon be "fairly possible").

Yet, when the court attempts to bypass *Chenery* and support its conclusion that the Commission would have found the fairness doctrine to contravene the public interest, it finds only the constitutional reasoning that permeates the Order. No separate ground exists for the majority to plant the *Ashwander* flag. For example, the court cites the Commission's condemnation of the doctrine's restriction on diverse viewpoints, interference with broadcasters' expression rights, and chilling effect, and then notes that "[i]t is hard to imagine any mental gymnastics by which the Commission, having delivered itself of such a condemnation, could go on to find the doctrine in the public interest." Maj. Op. at 11-12. Exactly. The Commission's reasoning, which no mental gymnastics could reasonably characterize as anything but constitutional analysis, renders problematic any contrary public interest determination (*e.g.*, accepting First Amendment losses to achieve equality gains), just as the Commission has claimed throughout its Order and these proceedings. But that does not render the Order before us any less a constitutional decision, and no alchemy can transform the

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ings, could not be affirmed as it came to the court. In such a situation, it was unobjectionable for the court to presume that the agency would, on remand, make a corrective finding that was compelled by the evidentiary record. This approach, however, is not justified where, as here, the record squarely presents us with a legitimate (constitutional) basis for decision. Similarly, in *Communication Workers of Am. v. NLRB*, 784 F.2d 847 (7th Cir. 1986), the agency was affirmed based on a ground of decision which the agency had explicitly stated was *independent* of another (erroneous) ground of decision. *Id.* at 851. Such an independent ground is simply not present in the Order before us.

Commission's gilt-edged reasoning into the lead of a public interest determination.

The court's "perplexity," provoked by the Commission's central conclusion (that the doctrine's "overall net effect [was] to reduce the coverage of controversial issues," 2 F.C.C.2d at 5050), further attests to the fundamentally constitutional nature of the Order. Maj. Op. at 24. The court finds the Commission's conclusion of "net effect" incoherent as a matter of orthodox administrative law reasoning about the public interest, *id.* at 24, but upholds the conclusion as "quite similar to the Supreme Court's finding of similar value judgments implicit in the [F]irst Amendment as applied to the print media." *Id.* at 25. Once again, exactly. As the Commission insists, we customarily call such reasoning "constitutional." But the court wishes to term that reasoning "a matter of policy," *id.*, and "an effort to resolve the issue not only in policy terms but also in constitutional ones," *id.* at 24. With all respect, the court can find only constitutional reasoning within the Order and can support the Order only by relying upon constitutional reasoning. Deeming that reasoning "policy" cannot call forth *Ashwander*, and footnote 120 cannot sweep away the rest of the Order.

In sum, as the FCC's decision is adequate in all respects and singularly unlikely to be altered on remand, I think the court is obliged to examine the FCC's decision—grounded in the Constitution—as it comes to us. It is to that issue, avoided by my colleagues, but pressed exclusively by all parties before this court,[8] that I must now turn.

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[8] The briefs uniformly speak of the FCC's "constitutional" decision under *Red Lion*. *See, e.g.*, Brief of Geller and Lampert at 1, 3, 5, 6, 15; Brief of SPC at 2, 3-7, 16; Brief of People for the American Way at 2; Brief of United Church of Christ at 41; Brief of Common Cause at 20; Brief of Democratic National Committee at 6. The court finds solace in the fact that some of the briefs do not label the FCC's factual conclusions regarding chilling effect and media growth "constitutional" findings. Maj. Op. at 12-13 n.4. Yet, the parties universally re-

II

A

The question before us—that is, the legality of the FCC's action—is somewhat of a hybrid, exhibiting both constitutional and administrative law characteristics. As I see it, judicial review of the FCC's Order is most correctly viewed as involving two distinct tasks. First, the court is called upon to scrutinize the Commission's interpretation of the constitutional principles enunciated in *Red Lion* and its progeny. This task involves measuring the FCC's articulation of constitutional principles, as distinguished from its application of those principles to the facts. Our scope of review in this particular is plenary. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *see also* Monaghan, Marbury and the Administrative State, 83 Col. L. Rev. 1, 6 (1983) (criticizing the view that *Marbury* supports independent review of agency statutory interpretation). Second, we are called upon to review the Commission's factual determinations. Of especial importance in this particular are the FCC's findings (1) that an "explosion" in the number and type of media outlets has occurred; (2) that the fairness doctrine chills speech and thereby effects a net reduction in coverage of controversial public issues; and (3) that the fairness doctrine unduly impinges upon broadcasters' editorial discretion.

The parties have assumed that the Commission's findings of fact are subject to review under the "arbitrary and capricious" standard laid down in the APA, 5 U.S.C. § 706 (1985); *see e.g.*, Brief of Syracuse Peace Council at 10. However, where, as here, factual determinations are intimately connected with the evaluation of constitutionality under the First Amendment, the Supreme Court has held (outside the agency context) that those findings should be reviewed independently. *Bose Corp. v.*

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late these findings to the *Red Lion* framework. *See, e.g.*, Brief of Meredith Corp. at 20.

Consumers Union of U.S., Inc., 466 U.S. 485, 506-510 (1984) (and cases cited therein). On reflection, I believe that in this instance the parties' assumption is well-founded; the administrative law model of review indeed applies notwithstanding the presence of important First Amendment questions. Although the FCC's factual findings are closely intermingled with its ultimate conclusion as to the constitutionality *vel non* of the fairness doctrine, independent review by the judiciary seems inappropriate for several reasons.

First, the FCC's Order does not deny a constitutional claim. No one has urged that the fairness doctrine is constitutionally compelled. Rather, the FCC has determined, pursuant to its obligation to uphold the Constitution, that the First Amendment requires elimination of the fairness doctrine. That point is of pivotal importance because the decisional law of the Supreme Court indicates that independent appellate review of facts is appropriate only where the decision under review *denies* a constitutional claim. *See, e.g., Time, Inc. v. Pape*, 401 U.S. 279, 284 (1971) (independent review will be exercised "in cases in which there is a claim of denial rights under the Federal Constitution"); *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964) (independent review functions to ensure "that the judgment does not constitute a forbidden intrusion on the field of free expression") (citations omitted).

This conclusion flows from the principle that independent review, where applicable, derives from the Constitution itself. *Bose v. Consumers Union*, 466 U.S. at 510 ("The requirement of independent review . . . is a rule of federal constitutional law"). Thus, where no constitutional rights are threatened by the findings at issue, the reason undergirding the unusual tack of independent appellate review of facts does not exist. *Id.* at 506 n.24 (citing *Fiske v. Kansas*, 274 U.S. 380, 385-87 (1927)). Indeed, in the present circumstances (*i.e.*, an agency decision) a limited standard of review has been

imposed by Congress in the familiar precincts of the APA.

Independent review of the Commission's findings also seems inappropriate because we have before us the predictive judgments of a federal agency concerning the (perceived) effects of its own policy. The Supreme Court has recognized that the FCC is possessed of substantial expertise with respect to the impact of the fairness doctrine on the communications marketplace. *See, e.g., FCC v. League of Women Voters of California*, 468 U.S. 364, 379 n.12 (1982). Indeed, the Court has accorded weight to factual findings underlying an FCC decision that broadcast regulation was inconsistent with the First Amendment. *Columbia Broadcasting System, Inc. v. Dem. Nat'l Comm.*, 412 U.S. 94, 122-23 (1973). The present case is thus readily distinguishable from instances in which the Supreme Court has independently reviewed the case-specific findings of juries or trial judges. *See e.g., Miller v. California*, 413 U.S. 15 (1973) (independent review of jury determination that a specific publication or film is "patently offensive" and appeals to the "prurient interest"). In view of the FCC's obvious expertise, we would be unwise (and unfaithful to the APA) to disregard the Commission's ultimate conclusions of fact with respect to the fairness doctrine's chilling effect; its interference with broadcasters' editorial discretion; and the explosive growth of media outlets.

B

Under these principles, the Commission's Order should be upheld. It is based on reasonable factual findings and embodies a correct statement of applicable constitutional principles. From the foregoing discussion of the applicable scope of review, it should be evident that our evaluation of the Commission's factual determinations partakes more of the nature of administrative law than of constitutional law analysis. That is, it would be anoma-

lous if judicial approval of agency factual findings were awarded the Olympian force of a "true" constitutional decision, *see Cooper v. Aaron*, 358 U.S. 1 (1958), where those findings were subjected only to limited, administrative law-genre scrutiny.

Vindication of the constitutional reasoning in the Order thus would *not* constitute a judicial determination that the fairness doctrine (as currently administered) is "unconstitutional."[9] To reiterate: I would hold only that the FCC's decision to eliminate the fairness doctrine correctly interprets *Red Lion* and is based, as the court's opinion effectively demonstrates, on an adequate factual record. Such a decision would therefore not automatically foreclose a future FCC (or Congress) from reestablishing the fairness doctrine in its present (or some modified) form. The fate of any future attempt to resurrect (or refashion) the fairness doctrine would depend, obviously, on the Supreme Court's articulation of applicable constitutional doctrine (*e.g.*, *Red Lion*); but it would also be affected by the scope of review applied to the facts upon which the "new" fairness doctrine was sought to be justified. Of course, as we have just seen, the line of cases culminating in *Bose Corp.* indicates that factual findings underlying the *denial* of a First Amendment challenge

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[9] This point undermines the court's conclusion that, under *Ashwander v. TVA*, 297 U.S. 288, 346-48 (Brandeis, J., concurring) (1935), this case must be decided independently on public interest grounds. Most commonly, *Ashwander* serves to prevent the possibility of judicial invalidation, on constitutional grounds, of the actions (especially legislative enactments) of coordinate branches. Where, as here, the government refuses to regulate (or, more precisely, to continue to regulate) because of perceived constitutional constraints, a judicial decision to uphold or reject the government's position has no such constitutional consequences. As we are called upon to restate the principles articulated in *Red Lion* and exercise administrative law-type scrutiny over the FCC's factual conclusions, there is no need to get all in a lather about *Ashwander* principles.

would be subject to independent review. Although this situation is, again, not before us today, it bears mentioning that this additional burden imposed on proponents of allegedly unconstitutional government action (*i.e.*, a "new" or "resurrected" fairness doctrine) represents the inevitable result of our system of constitutional supremacy.

I should hasten to add that this burden, while substantial, appears to be by no means hopelessly insurmountable. To the contrary, under the *Red Lion* framework (assuming, as I do, continued High Court allegiance to its teachings), the constitutionality of the fairness doctrine is linked in part to technological developments (and behavior) in the communications marketplace. Those developments obviously continue to unfold, with impacts that can only foggily be predicted. What is more, we have precious little experience in a *sans*-fairness doctrine regulatory environment. It remains to be seen whether the necessarily predictive judgments embodied in the Order will withstand the hard, true test of time. *Columbia Broadcasting System, Inc. v. Dem. Nat'l Comm.*, 412 U.S. at 102 ("the broadcast industry is dynamic in terms of technological change; . . . [solutions] acceptable today may well be outmoded 10 years hence").

In short, it is not at all inconceivable that detailed reconsideration by a future FCC or carefully considered Congressional findings, *compare Buckley v. Valeo*, 424 U.S. 1, 28 (1976) (limitations on campaign contributions focus precisely on problem of corruption and preserve substantial opportunities for political expression) *with Fullilove v. Klutznick*, 448 U.S. 448, 552 (1980) (Stevens, J. dissenting) (racial classification not "narrowly tailored" because it "raises too many serious questions that Congress failed to address or answer in a responsible way") *and Red Lion*, 395 U.S. at 399 n.26 (1969) (no specific agency findings needed in light of longstanding

Congressional judgment and absence of contrary evidence); could persuade a future court that, notwithstanding the FCC's contrary findings vindicated by today's decision, some *in futuro* version of the fairness doctrine could be implemented consistent with First Amendment strictures.

C

As to the constitutional principles applicable to this case, the parties are congenially in accord (1) that *Red Lion* principles govern; and (2) that, under the *Red Lion* framework, government restrictions on broadcasters' speech are valid only if "narowly tailored to further a substantial government interest, such as ensuring adequate and balanced coverage of public issues." Order at 5049 (quoting *FCC v. League of Women Voters*, 468 U.S. at 380). It is also by now well recognized that this standard affords broadcasters somewhat less First Amendment protection than that enjoyed by their print media counterparts. *Compare Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (content regulation of the print media must be narrowly tailored to serve a compelling government interest).[10]

But there consensus abruptly stops. Although the parties agree that *Red Lion* is king, they strenuously disagree over the proper interpretation of that seminal decision. For its part, the FCC argues that the constitutional question turns on whether enforcement of the fairness doctrine

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[10] Although the FCC sets forth the view (in other portions of the Order) that *Red Lion* itself may no longer be viable, the Commission expressly stated that reconsideration of *Red Lion* lies solely within the province of the Supreme Court (citing *Branch v. FCC*, 824 F.2d 37 (D.C. Cir. 1987), *cert. denied*, 444 U.S. 1013 (1988)) and that the Order is thus based on a *Red Lion* analysis. Order at 5065 n.103. Just so. It should therefore go without saying that the constitutional analysis in this opinion is grounded squarely (and, hopefully, rightly) on *Red Lion*'s methodological approach.

(1) chills speech and results in the net reduction of the presentation of controversial issues of public importance and

(2) excessively infringes on the editorial discretion of broadcast journalists and involves unnecessary government intervention to the extent that it is no longer narrowly tailored to meet its objective.

Order at 5049. The FCC believes that regulatory intervention through the vehicle of the fairness doctrine is not "narrowly tailored" if the number (and distribution) of media outlets ensures public access to diverse viewpoints. Order at 5051. That is, if access to diverse viewpoints can be achieved without the fairness doctrine, then the doctrine is not "narrowly tailored" because it unnecessarily interferes with editorial decisions. Finally, the FCC interprets *Red Lion* to render the fairness doctrine unconstitutional if either of these tests (net reduction or not "narrowly tailored") is satisfied. Order at 5052.

Petitioners' most vigorous attack is aimed at the proposition that the numerosity of media outlets and intrusive impact of the fairness doctrine may, without more, render the fairness doctrine unconstitutional. Petitioners contend that the relevant concern is the number of media outlets relative to the demand of broadcasters (expressed through license applications) for such outlets. More pertinently, petitioners direct our attention to the unique characteristic of broadcast regulation, namely the potential for interference occasioned by the fact that the broadcast spectrum can physically accommodate only a finite number of users. The potential for signal interference among competing broadcasters, it is argued, necessitates an allocation system whereby regulatory authority assures to broadcasters exclusive use of their portions of the spectrum. As this system by its nature excludes some who wish to broadcast, the readmission of excluded speakers via the fairness doctrine is constitutionally per-

missible, petitioners maintain, as an adjunct to the licensing system.

To recap: as petitioners see it, the fairness doctrine is constitutionally permissible so long as *allocational scarcity* exists, namely, that demand for broadcast frequencies exceeds supply. *See, e.g.*, Brief for Syracuse Peace Council at 22-27. The FCC, in contrast, asserts that the constitutionality of the doctrine depends on *numerical scarcity* in the sense that, without government intervention, the public is not provided with access to diverse viewpoints.

There is thus a rather pivotal difference in the perspectives vying for judicial approbation. As I see it, the FCC's position is much better founded; indeed, in my view, petitioners have fallen badly into error by misreading *Red Lion*. There is, to be sure, language in *Red Lion* with respect to the scarcity of the broadcast spectrum and the consequent tendency toward unrequited demand for frequencies. *Red Lion*, 395 U.S. at 366. Under *Red Lion*, however, that sort of scarcity seems to constitute a necessary (rather than sufficient) condition of the fairness doctrine's legitimacy. That is, allocational scarcity accounts for the fundamental difference in First Amendment treatment of print and broadcast media. *See FCC v. League of Women Voters*, 468 U.S. at 377 ("[t]he fundamental distinguishing characteristic of the new medium of broadcasting that, in our view, has required some adjustment in First Amendment analysis is that '[b]roadcast frequencies are a scarce resource [that] must be portioned out among applicants.' ") citing *Columbia Broadcasting Co. v. Dem. Nat'l Comm.*, 412 U.S. at 101; *Red Lion*, 395 U.S. at 386 ("differences in the characteristics of new media justify differences in the First Amendment standards applied to them"). However, spectrum scarcity, without more, does not necessarily justify regulatory schemes which intrude into First Amendment territory. This point is made clear

by the familiar cases in which the Court has upheld broadcast regulation on the ground that the regulation *furthered* substantial First Amendment interests, *see Red Lion*, 395 U.S. at 396; *Columbia Broadcasting Co. v. FCC*, 453 U.S. 367, 396 (1981); and by the case of *Columbia Broadcasting Co. v. Dem. Nat'l Comm.*, 412 U.S. at 127-32, where the Court held that the FCC need not require licensees to accept all paid political advertisements because such a requirement unduly impinged upon broadcasters' rights and produced little public benefit. In short, petitioners conflate the Supreme Court's choice of a standard for evaluating broadcast regulation with the Court's application of its chosen standard to the interests assertedly advanced by a particular regulatory regime.

Petitioners' reliance on the concept of allocational scarcity is logically flawed as well. As part of their attack on numerical scarcity, petitioners contend that "[t]he *Red Lion* court (sic) did not speak in terms of satiation, or hypothesize a point at which 'enough' diversity is present. . . . Only when supply and demand [for licenses] reach equipoise does the governmental interest change." Brief of Syracuse Peace Council at 24. The argument is an intriguing one; but I think, with all respect, that it focuses with undue exclusivity on the market for broadcast licenses, whereas the central concern of *Red Lion* is that the fairness doctrine "preserve an uninhibited marketplace of ideas". *Red Lion*, 395 U.S. at 390. Indeed, a reading of *Red Lion* yields no evidence that the mere presence of excluded *broadcasters* is to be regarded as dispositive of the *public's* need for programming of a particular type. Especially since individual members of the listening or viewing public, such as disappointed broadcast license applicants, may express their viewpoints on controversial issues in any number of ways that do not involve applying for and receiving a broadcasting license, it seems odd (and inaccurate) to equate scarcity in licenses with scarcity in the market-

place of ideas. Indeed, petitioners' argument ultimately flies in the teeth of *Red Lion's* admonition that "it is the right of viewers and listeners and not that of broadcasters, which is paramount." *Red Lion*, 395 U.S. at 390.[11]

In contrast, the FCC has correctly discerned that, under *Red Lion*, the constitutionality of the fairness doctrine is closely related to the incapacity of the communications marketplace to give expression to diverse voices. As the Court stated, "[i]t is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here." *Id.* *Red Lion* teaches that regulation such as the fairness doctrine is constitutionally permissible where, in the absence of regulation, such voices would "by necessity be barred from the airwaves." *Id.* at 319.

The governing constitutional doctrine therefore recognizes that the communications marketplace may be sufficiently responsive to the public's need for controversial issue programming so that government regulation is unnecessary. *Cf. Red Lion*, 395 U.S. at 397 (fairness doctrine constitutional in light of the fact that the increased carrying capacity of the broadcast spectrum has been devoted largely to uses unrelated to debate on controversial issues). As a corollary of that principle, the FCC also recognized that, where the communications marketplace itself provides a plethora of voices, the fairness doctrine is not only superfluous, it is positively harmful. This is of singular importance in the analysis. As the Court has stated time and again, regulatory schemes that tread unnecessarily on the editorial discretion of broadcasters contravene the First Amendment.

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[11] This defect in petitioners' constitutional argument does not, of course, relieve the FCC of the obligation to support its conclusion that viewpoint diversity exists in the absence of the demands imposed by the fairness doctrine. This point is discussed *infra* in section D of the opinion.

Columbia Broadcasting System, Inc. v. FCC, 453 U.S. at 395. ("[T]he broadcasting industry is entitled under the First Amendment to exercise 'the widest journalistic freedom consistent with its public [duties].") quoting *Columbia Broadcasting System, Inc. v. Dem. Nat'l Comm.*, 412 U.S. at 110.

The Commission is also correct in interpreting the Supreme Court's holdings as rendering the fairness doctrine constitutionally problematic where the "net effect" of the doctrine is a reduction in coverage of controversial public issues. The Supreme Court has expressly indicated that

> were it to be shown by the Commission that the fairness doctrine "[h]as the net effect of reducing rather than enhancing speech," we would then be forced to reconsider the constitutional basis of our decision in [*Red Lion*].

FCC v. League of Women Voters, 468 U.S. at 379 n.12 (citations omitted). Obviously, as the fairness doctrine exists *to promote speech* on controversial issues, it seems manifest that the doctrine should not readily enjoy constitutional approbation if it ceases to promote and secure bedrock constitutional interests.

D

As the court's opinion ably demonstrates, the Commission's factual determinations (1) that the growth of broadcast outlets ensures the public's access to viewpoint diversity, and (2) that the fairness doctrine ultimately operates to reduce coverage of controversial issues, find reasonable support in the record. Rather than rehearse the salient points of the record in detail, it suffices for present purposes to highlight several points.

Significantly, petitioners do not dispute that, since the late '60s when *Red Lion* was handed down, the number of media sources has expanded dramatically. The num-

ber of full power TV stations has increased 54 percent, Order at 5051, with the result that nearly 96 percent of U.S. households with television received five or more signals. Nearly two thirds of U.S. households received 9 or more signals. *1985 Fairness Report*, 102 FCC 2d at 204-05. Similarly, the number of radio stations has increased 57 percent since the first year of the Nixon Administration, when *Red Lion* was first introduced to the world of constitutional law. Order at 5051. As of 1987, listeners had access to an average of 6 radio stations in the smallest markets and a whopping 25 stations in the largest markets. Brief of FCC at 25. As commuters and Walkman aficionados know, all news-all talk stations (or some variation thereof) abound in large markets.

The Commission also took account of the growth of various non-broadcast media, the most important of which is cable television. More than half of the nation's TV households currently subscribe to cable. *Id.* at 26. The number is growing. Optimists around town say that even District of Columbia residents are beginning to enjoy access to this increasingly universal manifestation of the electronic Agora. And, the proliferation of choice ushered in by cable is staggering. Over 94 percent of cable subscribers receive more than 12 channels; some cable systems have the capacity to offer more than 100 channels. *Id.* at 27.

Petitioners are, nonetheless, unconvinced by all this. They assert that these data fail to support the FCC's pivotal conclusion that "the interest of the public in viewpoint diversity is fully served by the multiplicity of voices in the marketplace today". Order at 5051, quoting *1985 Fairness Report*, 102 FCC 2d at 147. They emphasize that the growth in media outlets has not reached many local markets. Brief of Syracuse Peace Council at 28. But, as Judge Williams' opinion for the court persuasively indicates, the data offered by petitioners in this respect fall short of drawing into question

the impressive statistics marshalled by the FCC. No more need be said in these already overlong pages on that score.

Petitioners also contend that the increase in media sources has not resulted in significant increases in controversial issue programming. They point in particular to FM radio and UHF TV as examples of media sources that have grown rapidly without contributing significantly to viewpoint diversity. The FCC responds that petitioners offer little to back up their opinion-laden allegations. Order at 5051. But, even assuming that UHF TV and FM radio programs are not particularly intensive in their coverage of controversial issues, I am satisfied that the FCC did not put all of its eggs in one part of the large communications-market basket. Rather, as we just saw, the Order points to growth in broadcast media and non-broadcast technologies such as cable and satellite television. *Id.* The Commission has also indicated that these technologies are contributing to viewpoint diversity. For example, one well-known cable channel, whose chief anchor is blessed with the name of Bernard Shaw, is devoted solely to news; two cable channels are given over to coverage of Congress and related issues. Brief of FCC at 27 n.25. We are told that the media stand ready and able to enter (and in some instances are entering) the courthouses of this blessed land, if the least dangerous branch decides to opt in favor of *glasnost* in its own house. In short, inasmuch as the Commission has relied on credible evidence concerning the growth and programming in many types of media, I cannot, in conscience, condemn as arbitrary and capricious its ultimate finding that the communications market as a whole provides "reasonable assurance" of public access to viewpoint diversity.

As to the FCC's finding that the fairness doctrine so chilled speech as to result in a net reduction in the coverage of controversial issues, the court quite correctly

notes that, where government regulation imposes substantial (and, to a certain extent, unpredictable) consequences on speech, drawing an inference of some chilling effect hardly represents an heroic step in our First Amendment tradition. Maj. Op. at 22. Of greater difficulty is the FCC's finding of a net reduction in controversial issue programming. Petitioners' main argument in this particular is that the Commission gave undue weight to testimony of chilling effect and insufficient weight to evidence that the doctrine stimulated speech.

In the face of these arguments, my colleagues state that "[w]e are frankly uncertain how anyone could be sure either way." *Id.* at 24. Although I agree that the positive and negative impacts of the fairness doctrine cannot be precisely determined, it does not follow that we are justified in upholding the Commission's finding of net reduction on the grounds that "the doctrine's deterrent effects were on the same scale as it expression-generating ones" and that fairness doctrine-induced coverage is to be devalued as "governmentally-coerced speech" fraught with the possibility of partisan abuse. *Id.* at 25. The first ground seems inappropriate because, in my view, the Commission never made that finding. The second ground is irrelevant because it relates not to the finding of chilling effect, but to the doctrine's impact on distinct First Amendment values such as unfettered editorial discretion.[12]

The fact that a reviewing court cannot "be sure" of the correctness of the Commission's finding of net reduc-

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[12] The Commission's statements regarding "governmentally coerced" speech are not found in the portion of the Order addressed to the fairness doctrine's chilling effect. Order at 5049-50. Rather, coerced speech is examined in connection with the doctrine's impact on editorial discretion, *id.* at 5050-51, and with the FCC's analysis of the continued viability of different First Amendment standards for print and broadcast media. Order at 5052-57. The latter issue involves sensitive territory which I respectfully decline to explore.

tion should not lead us to rely on Commission findings that are not germane to the analytically distinct question of the extent to which the fairness doctrine chills speech. In view of the attention given by the Supreme Court to the net reduction issue, *FCC v. League of Women Voters*, 468 U.S. at 379 n.12 (a finding that the fairness doctrine has the net effect of reducing speech would require reconsideration of *Red Lion*), and the principle that the interests of broadcasters, while important, are ultimately secondary to those of the viewing and listening public, our review should focus on the evidence adduced by the Commission in favor of its conclusion of a net reduction.

In this respect, my reading of the Order suggests that the Commission, based on its regulatory experience and testimony before the agency concerning chilling effects, reasonably determined that the fairness doctrine's predominant effect on speech was inhibitory. Order at 5049. Specifically, the Commission found that the fairness doctrine chilled individual program decisions *and* induced broadcasters to adopt categorical policies against carrying editorials, political advertisements or nationally-produced public affairs programs. Order at 5050. The Commission further noted that, by virtue of the fairness doctrine, many broadcasters were encouraged not to air controversial issue programming above that minimal amount required by the first part of the doctrine. *Id.* at 5049. The Commission was also entitled to take into account the fact that the doctrine, by requiring coverage only of "major" contrasting viewpoints, fell with particular severity on broadcasters who express unorthodox views, thus tending to deprive the public of "uninhibited, robust and wide-open" debate. *New York Times v. Sullivan*, 376 U.S. 270. *Id.* Finally, the Commission pointed to the fact that "no broadcaster indicated to us that its station's coverage of controversial issues has increased as a result of the fairness doctrine." Order at 5050.

These findings, taken together, reasonably support the Commission's ultimate conclusion that elimination of the fairness doctrine would unleash a substantial amount of controversial issue programming.[18] In light of our limited scope of review, this factually supported conclusion withstands judicial scrutiny in the absence of powerfully contradictory evidence. *Cf. Columbia Broadcasting System v. Dem. Nat'l Comm.*, 412 U.S. at 123-24 ("The Court of Appeals failed to give due weight to the Commission's judgment [that], on balance, the undesirable effects of the right of access urged by respondents would outweigh the asserted benefits"). Petitioners' various arguments to the contrary, although not without force, serve ultimately to underscore the complexity of this issue, but they fail fatally to undermine the FCC's ultimate conclusion.

E

A final criticism directed at the Order concerns the Commission's decision to eliminate the first part of the fairness doctrine, which requires broadcasters "to cover

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[18] Petitioners claim that, under *Red Lion*, the proper response to such a chilling effect is more stringent enforcement of part one of the fairness doctrine, which requires reasonable coverage of controversial issues. This contention is based on the statement in *Red Lion* that "if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage . . . the Commission is not powerless to insist that [broadcasters] give adequate and fair attention to public issues." *Red Lion*, 395 U.S. at 393. In light of the reasonableness of the Commission's findings regarding the growth of media outlets and the fairness doctrine's net negative impact, petitioners' argument should be rejected. Once it is accepted that diverse viewpoints will be available to the public due to the growth of media outlets and the elimination of part two of the fairness doctrine, petitioners' proposed remedy unjustifiably burdens editorial discretion. As the Court stated in *Red Lion*, "it would be better if the FCC's encouragement were never necessary to induce the broadcasters to meet their responsibility". *Id.*

vitally important controversial issues of interest in their communities". Order at 5058 n.2. Review of this determination is rendered difficult by the modestly peripheral role that Part One has played throughout the case. As the Commission recognized, "an overwhelming majority of the complaints we receive and virtually all our orders directing licensees to take corrective action . . . involve the second prong of the doctrine." *Inquiry Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees*, 2 FCC Rcd Vol. 17 5272, 5289 (1987) ("Alternatives Report") (quoting *1985 Fairness Report*, 102 FCC 2d at 161). By the Commission's account, most of the evidence relating to the fairness doctrine's chilling effect and interference with editorial discretion concerned the second part of the doctrine. Indeed, in view of the limited demands placed on licensees by Part One of the fairness doctrine, the FCC expressly disclaimed a finding that, standing alone, the first part of the doctrine would be unconstitutional. Reconsideration Order, 3 FCC Rcd 2035, 2038 (1988).

The Commission's policy decision to jettison Part One is explained, in part, by reference to the perceived inseverability of the fairness doctrine's two components. Order at 5048. As the court's opinion convincingly demonstrates, however, the Commission's severability argument is more in the nature of a conclusion than an explanation. Maj. Op. at 30. More plausible is the Commission's contention that, as the first part of the fairness doctrine is "largely duplicative" of the requirement that broadcasters cover issues responsive to the needs of their community, retention of Part One would produce "no added public benefit". Reconsideration Order at 2038. This point is rather unilluminating, however, in light of the Commission's emphasis elsewhere on the distinctions between Part One of the fairness doctrine and the requirement of community issue programming. Brief of Syracuse Peace Council at 48 (the issue responsive standard does not mandate coverage of "controversial public issues of public importance such as require cover-

age pursuant to the Fairness Doctrine") (quoting *Deregulation of Radio*, 84 FCC 2d 968, 983 n.36, *recon. denied*, 87 FCC 2d 797 (1981), *rev'd in part on other grounds*, *Office of Communication of United Church of Christ v. FCC*, 707 F. 2d 1413, 1430-32 (D.C. Cir. 1983) *cert. denied*, *Black Citizens for a Fair Media v. FCC*, 467 U.S. 1255 (1984). Indeed, petitioners point out that the FCC loosened the issue-responsive obligation in part because of a distinct obligation imposed under Part One. *Id.* at 979. In light of the admitted difference between the two regulatory standards, I am of the view that the Commission's "largely duplicative" rationale is inadequate.

Despite these deficiencies, I nonetheless agree that the Commission reasonably eliminated Part One in light of the FCC's findings that the explosive growth in media outlets, combined with the removal of the deterrent to controversial public issue programming imposed by Part Two of the doctrine, will adequately ensure availability of such programs. Reconsideration Order at 2038. The reasonableness of the Commission's decision to eliminate Part One is reinforced by the (inevitably) predictive quality of the FCC's reasoning. It is in this sense that I agree with Judge Williams that the Commission is entitled to conclude that elimination of Part One would not create an impermissible regulatory gap. Maj. Op. at 31. As petitioners have not effectively countered the FCC's findings, the Commission should be permitted, in effect, to experiment with this reform.

* * * *

For the foregoing reasons, I conclude that the FCC's Order in this case should successfully stand in the face of petitioners' onslaught. But in arriving at this destination, I can only end the journey by looking back on the trip and concluding that the *Ashwander*-inspired detour need not have been taken. Since my colleagues have chosen a very different road map to guide them, I am constrained to concur only in the court's judgment.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUT

No. 87-1516 **September Term, 1988**

Syracuse Peace Council, et al.
Petitioners

v.

Federal Communications Commission
and the United States of America
Respondents

Meredith Corporation, et al.,
Intervenors

---

and Consolidated Case No. 87-1544

PETITIONS FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BEFORE: WALD, Chief Judge; and STARR and WILLIAMS, Circuit Judges

J U D G M E N T

These causes came on to be heard on the petitions for review of an order of the Federal Communications Commission and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the petitions for review are denied, in accordance with the Opinion of the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/ Constance L. Dupre
CONSTANCE L. DUPRE, CLERK

Date: February 10, 1989
Opinion for the Court filed by Circuit Judge Williams.
Opinion concurring in part and dissenting in part filed by Chief Judge Wald.
Concurring opinion filed by Circuit Judge Starr.

A True Copy:
Test: Constance L.Dupre
United States Court of Appeals
For the District of Columbia Circuit
By: /s/ Patrice Fisher

United States Court of Appeals
For the District of Columbia Circuit
FILED FEB 10 1989
CONSTANCE L.DUPRE
CLERK

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUT

No. 87-1516 **September Term, 1988**

Syracuse Peace Council, et al.
Petitioners

v.

Federal Communications Commission
and the United States of America
Respondents

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and Consolidated Case No. 87-1544

BEFORE: Wald, Chief Judge; Starr and Williams, Circuit Judges

ORDER

Upon consideration of petitioners' petition for rehearing filed March 27, 1989, it is

ORDERED, by the Court, that the petition is denied.

FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

United States Court of Appeals
For the District of Columbia Circuit
FILED APR 25 1989
CONSTANCE L. DUPRE
CLERK

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUT

No. 87-1516 **September Term, 1988**

Syracuse Peace Council, et al.
Petitioners

v.

Federal Communications Commission
and the United States of America
Respondents

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and Consolidated Case No. 87-1544

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Starr, Silberman, Buckley, Williams, D.H. Ginsburg and Sentelle, Circuit Judges

ORDER

Petitioner's Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

United States Court of Appeals
For the District of Columbia Circuit
FILED APR 25 1989
CONSTANCE L. DUPRE
CLERK

FCC 85-459

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees	Gen. Docket No. 84-282

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FCC 85-495

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees	Gen. Docket No. 84-282

REPORT
(Proceeding Terminated)

Adopted: August 7, 1985; Released: August 23, 1985

BY THE COMMISSION: *CHAIRMAN FOWLER ISSUING A SEPARATE STATEMENT; COMMISSIONER QUELLO CONCURRING AND ISSUING A STATEMENT; COMMISSIONER RIVERA NOT PARTICIPATING.*

I. Introduction

1. Before the Commission for consideration are the matters raised by the *Notice of Inquiry* in the above-captioned proceeding in which the Commission solicited comments on the statutory, constitutional, and policy implications underlying the fairness doctrine. Specifically, the Commission questioned whether the doctrine is constitutionally permissible under current marketplace conditions and First Amendment jurisprudence. Moreover, as a policy matter, the Commission inquired whether the doctrine remains necessary to further the governmental interest in an informed electorate and solicited comment on whether or not the doctrine, in operation, has an impermissible "chilling" effect on the free expression of ideas. Finally, the Commission queried whether the fairness doctrine is codified either by Sections 315 or by the general public interest standard embodied in the Communications Act.

[1] *Notice of Inquiry* in Gen. Docket No. 84-282, FC 84-140, 49 Fed. Reg. 20317 (May 14, 1984) [hereinafter cited as "*Notice*"].

2. More than one hundred parties submitted formal comments and reply comments in this proceeding.[2] Many other persons participated in this proceeding through the submission of informal comments. In addition, the Commission, *en banc*, on February 7 and 8, 1985, heard oral presentations on the issues raised by the *Notice*.

3. The fairness doctrine, as developed by the Commission, imposes upon broadcasters a two-pronged obligation. Broadcast licensees are required to provide coverage of vitally important controversial issues of interest in the community served by the licensees and to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues.[3] An examination of the genesis of the fairness doctrine reveals an evolutionary process, spanning a considerable period of time, and marked by a considerable uncertainty as to the proper approaches to insure that licensees operate in the public interest.[4] This inquiry is a further step in a continuing process in evaluating the fairness doctrine.[5] In undertaking this reexamination, we will first determine the purposes underlying promulgation of the fairness doctrine and then assess, in light of current market place conditions, whether or not its retention is consistent with the public interest.

4. Our past judgment that the fairness doctrine comports with the public interest was predicted upon three factors. First, in light of the limited availability of broadcast frequencies and the resultant need for government licensing, we concluded that the licensee is a public fiduciary, obligated to present diverse view-

[2] A list of all the parties which filed formal comments and reply comments in this proceeding is contained in the attached Appendix.

[3] *Fairness Report* in Docket No. 19260, 48 FCC 2d 1 (1974), *recon. denied*, 58 FCC 2d 691 (1976), *aff'd sub nom. National Citizens Committee for Broadcasting v. FCC*, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978) ["hereinafter cited as "*1974 Fairness Report*"].

[4] For a detailed examination of the history of the fairness doctrine, *see Notice, supra* n.1.

[5] In light of the fact that "the weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance" [*FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 810 (1978)], we have an affirmative duty periodically to reassess the wisdom of our rules, even those of long standing, and to determine whether or not they should be altered or even eliminated in light of changed circumstances. *See, e.g., NAACP v. FCC*, 682 F.2d 993 (D.C. Cir. 1982). The Supreme Court has recognized that "[r]egulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and pratices to the Nation's needs in a volatile, changing economy." *American Trucking Association, Inc. v. Atchison, Topeka & Santa Fe Railway Co.*, 387 U.S. 397, 416, *reh. denied*, 389 U.S. 889 (1967). *See Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

points representative of the community at large. We determined that the need to effectuate the right of the viewing and listening public to suitable access to the marketplace of ideas justifies restrictions on the rights of broadcasters.[6] Second, we presumed that a governmentally imposed restriction on the content of programming is a viable mechanism—indeed the best mechanism—by which to vindicate this public interest.[7] Third, we determined, as a factual matter, that the fairness doctrine, in operation, has the effect of enhancing the flow of diverse viewpoints to the public.[8]

5. On the basis of the voluminous factual record compiled in this proceeding, our experience in administering the doctrine and our general expertise in broadcast regulation, we no longer believe that the fairness doctrine, as a matter of policy, serves the public interest. In making this determination, we do not question the interest of the listening and viewing public in obtaining access to diverse and antagonistic sources of information.[9] Rather, we conclude that the fairness doctrine is no longer a necessary or appropriate means by which to effectuate this interest. We believe that the interest of the public in viewpoint diversity is fully served by the multiplicity of voices in the marketplace today and that the intrusion by government into the content of programming occasioned by the enforcement of the doctrine unnecessarily restricts the journalistic freedom of broadcasters. Furthermore, we find that the fairness doctrine, in operation, actually inhibits the presentation of controversial issues of public importance to the detriment of the public and in degradation of the editorial prerogatives of broadcast journalists.

6. We believe that the same factors which demonstrate that the

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[6] We stated that it is necessary to vindicate:

> . . . the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community. It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.

Report of the Commission in Docket No. 8516, 13 FCC 1246, 1249 (1949) [hereinafter cited as "*1949 Fairness Report*"]. *See 1974 Fairness Report*, 48 FCC 2d at 2-3.

[7] *1974 Fairness Report*, 48 FCC 2d at 6.

[8] *Id.* at 7.

[9] As the Supreme Court has stated, "speech concerning public affairs is more than self-expression: it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1966).

fairness doctrine is no longer appropriate as a matter of policy also suggest that the doctrine may no longer be permissible as a matter of constitutional law. We recognize that the United States Supreme Court, in *Red Lion Broadcasting Co. v. FCC*[10] upheld the constitutionality of the fairness doctrine. But in the intervening sixteen years the information services marketplace has expanded markedly, thereby making it unnecessary to rely upon intrusive government regulation in order to assure that the public has access to the marketplace of ideas. In addition, the compelling evidence adduced in this proceeding demonstrates that the fairness doctrine, in operation, inhibits the presentation of controversial issues of public importance; this fact impels the dual conclusion that the doctrine impedes the public's access to the marketplace of ideas and poses an unwarranted intrusion upon the journalistic freedom of broadcasters.

7. While we are firmly convinced that the fairness doctrine, as a matter of policy, disserves the public interest, the issue as to whether or not Congress has empowered us to eliminate the doctrine is not one which is easily resolved. The fairness doctrine evolved as an administrative policy promulgated by the Commission pursuant to congressionally delegated power. While we do not believe that the fairness doctrine is a necessary component of the general "public interest" standard contained in the Communications Act,[11] the question of whether or not Congress in amending Section 315 in 1959 codified the doctrine, thereby requiring us to retain it, is more problematic. In any event, the fairness doctrine has been a longstanding administrative policy and central tenet of broadcast regulation that Congress has chosen not to eliminate. Moreover, there are proposals pending before Congress to repeal the doctrine. As a consequence, we believe that it would be inappropriate at this time for us to either eliminate or significantly restrict the scope of the doctrine. Instead, we will afford Congress an opportunity to review the fairness doctrine in light of the evidence adduced in this proceeding.

II. The Constitutionality of the Fairness Doctrine is Suspect

8. As we stated in the *Notice*,[12] the fairness doctrine, as a governmentally imposed regulation affecting the content of

[10] 395 U.S. 367 (1969).
[11] 47 U.S.C. § 309 (1982).
[12] *See Notice, supra* n.1 at ¶¶81-95.

speech, has significant constitutional ramifications. Because "the 'public interest' standard necessarily invites reference to First Amendment principles,"[13] it is appropriate for us to consider the constitutional implications of the doctrine.

9. The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be inhibited, robust, and wide-open. . . ."[14] As Justice White noted in *Miami Herald v. Tornillo*:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.[15]

10. The means chosen by the Founders to promote the free discussion of public issues was to prohibit the government from intruding into the marketplace of ideas. As the Supreme Court has stated, "the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' "[16] The framers of the First Amendment proscribed the government from placing its official imprimatur on any particular viewpoint; they presumed that the marketplace of ideas would flourish best without the necessity or danger of governmental intervention.[17]

11. Under the First Amendment the expression of opinion on matters of public concern "is entitled to the most exacting degree of First Amendment protection."[18] As the United States Supreme

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[13] *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973). *See also American Security Council Education Foundation v. FCC*, 607 F.2d 438, 443 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980).

[14] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

[15] 418 U.S. 241, 259 (1974), *quoting Mills v. Alabama*, 384 U.S. 214, 218-19 (1969) (White J., concurring).

[16] *Bridges v. California*, 314 U.S. 252, 263 (1941). As Justice Potter Stewart has stated:

> Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believe that "fairness" was too fragile to be left for a government bureaucracy to accomplish.

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. at 145 (Stewart, J., concurring).

[17] The United States Supreme Court has stated that "in the realm of ideas [the Constitution] protects expression which is eloquent no less than that which is unconvincing." *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, 360 U.S. 684, 689 (1959).

[18] *FCC v. League of Women Voters of California*, _____U.S. _____, 104 S. Ct. 3106, 3115 (1984). *See First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77, *reh. denied*, 438 U.S. 907 (1978); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

Court has stated, the "[d]iscussion of public issues . . . are integral to the operation of the system of government established by our Constitution,"[19] and, therefore, essential to an informed democratic citizenry.[20] In addition, as Justice Brennan has recently observed, a "general proscription against unnecessarily broad content-based regulation permeates First Amendment jurisprudence."[21]

12. The United States Supreme Court upheld the constitutionality of the fairness doctrine in *Red Lion Broadcasting Co. v. FCC*,[22] "despite the general [F]irst [A]mendment prohibition on government regulation of speech and of the press"[23] because the Court, at that time, perceived that the doctrine furthered "the paramount [F]irst [A]mendment right of viewers and listeners to receive 'suitable access to . . . ideas and experiences.' "[24] For several reasons, however, the Court's decision in *Red Lion*, was narrowly circumscribed. First, in its opinion, the Court expressly stated that its holding did not constitute approval of every aspect of the fairness doctrine.[25] Second, relying upon our representation that there was no validity to the contention that the fairness doctrine, in operation, lessens the coverage of controversial issues on the nation's airwaves,[26] the Court asserted that

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[19] *Buckley v. Valeo*, 424 U.S. at 14.

[20] The United States Supreme Court has recently reaffirmed that:

> It is speech on 'matters of public concern' that is "at the heart of the First Amendment's protection.' *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978), *quoting Thornhill v. Alabama*, 310 U.S. 88, 101 (1940). As we stated in *Connick v. Myers*, 461 U.S. 138, 145 (1983), .. "the Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 445, 467 (1980)."

Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc., _____U.S. _____, 53 U.S.L.W. 4866, 4869 (U.S. June 26, 1985) (No. 83-18).

[21] *Id.* at 4874 (Brennan, J., dissenting). *See also Banzhaf v. FCC*, 405 F.2d 1082, 1100 (D.C. Cir. 1968), *cert. denied sub nom. American Broadcasting Companies v. FCC*, 396 U.S. 842 (1969) ("The First Amendment is unmistakably hostile to governmental controls over the content of the press").

[22] *Red Lion Broadcasting Co. v. FCC*, *supra* n.10.

[23] *American Security Council Education Foundation v. FCC*, 607 F.2d at 443-44.

[24] *Id.*, *quoting Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 389-90 (ellipses in original).

[25] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 396.

[26] In *Red Lion*, the Court stated that if broadcasters'

> . . . coverage of controversial public issues will be eliminated or at least rendered wholly ineffective [by the doctrine] [s]uch a result would indeed be a serious matter, for . . . the purposes of the doctrine would be stifled.
>
> At this point, however, as the Federal Communications Commission has indicated, that possibility is at best speculative.

> if experience with the administration of these doctrines indicates that they have the net affect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications.[27]

Third, the Court's decision was necessarily premised upon the broadcasting marketplace as it existed more than sixteen years ago.[28]

13. As a consequence, serious questions regarding the constitutionality of the fairness doctrine continued in spite of the Supreme Court's decision in *Red Lion*. Indeed, as the United States Court of Appeals stated in referring to that decision:

> [d]espite this holding, important constitutional questions continue to haunt this area of the law. The doctrine and the rule do, after all, involve the Government to a significant degree in policing the content of communication . . . [and there are] abiding First Amendment difficulties. . . .[29]

14. Subsequent to *Red Lion*, the Court in *Miami Herald Publishing Co. v. Tornillo*[30] invalidated, on First Amendment grounds, a Florida statute which gave political candidates a right to reply to criticisms and attacks by a newspaper. In that case the Court, in a unanimous opinion, determined that the inevitable effect of a governmentally imposed right of reply requirement would be to reduce the amount of controversial issues of public importance presented in the press. The Court concluded that:

> Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid

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Id. at 393. *See also American Security Council Education Foundation v. FCC*, 607 F.2d at 444.

[27] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 393. Similarly, the United States Court of Appeals has stated that "[i]f the fairness doctrine cannot withstand First Amendment scrutiny, the reason is that to insure a balanced presentation of controversial issues may be to insure no presentation, or no vigorous presentation, at all." *Banzhaf v. FCC*, F.2d at 1102-03.

[28] As the Supreme Court has recognized:

> Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of a great delicacy and difficulty. . . . The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence.

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. at 102.

[29] *Straus Communications, Inc. v. FCC*, 530 F.2d 1001, 1008 (D.C. Cir. 1976).

[30] *Miami Herald Publishing Co. v. Tornillo, supra* n.15.

> controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably "dampens the vigor and limits the variety of public debate."[31]

Indeed, the Court, in *Miami Herald*, intimated that the regulatory requirements that we impose may be even more inhibiting than those contained in the "right of reply" statute because print journalists are not "subject to the finite technological limitations of time that confront a broadcaster. . . ."[32]

15. In *FCC v. League of Women Voters*[33] the Court has recently reaffirmed that the constitutional permissibility of the fairness doctrine is predicated upon a factual presumption that the doctrine has the effect of enhancing the coverage of controversial issues available to the viewing and listening public. Indeed, the Court stated that it would be obligated to reevaluate the constitutionality of the doctrine if the Commission demonstrated the falsity of this assumption.[34] In addition, the Court indicated that it may be willing to reassess the constitutional standards traditionally applied in broadcast regulation. The Court stated that:

> The prevailing rationale for broadcast regulation based upon spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete. *See, e.g.*, Fowler & Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex. L. Rev. 207, 221-226 (1982). We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.[35]

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[31] *Id.* at 257, *quoting New York Times Co. v. Sullivan*, 376 U.S. at 279.

[32] *Id.* at 256-57.

[33] *FCC v. League of Women Voters of California, supra* n.18.

[34] The Court asserted that:

> As we recognized in *Red Lion*, however, were it to be shown by the Commission that the fairness doctrine "has the effect of reducing rather than enhancing" speech, we would then be *forced* to reconsider the constitutional basis of our decision in that case.

Id. at 3117 n.12, *quoting Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 393 (emphasis added).

[35] *Id.* at 3116 n.11. The United States Court of Appeals has also indicated that the proliferation of broadcast outlets may affect the extent to which the speech of broadcasters is protected by the First Amendment:

> [t]oday when the number of broadcast stations not only far exceeds the number when the Communications Act was adopted and the number when

Our reading of this language is that the decision in *Red Lion*, as well as the level of constitutional scrutiny applied to content regulation of broadcast speech, could change if the factual predicates which the Supreme Court relied upon in that case have changed. As a consequence, while we recognize that the Supreme Court's decision in *Red Lion* is controlling law unless the Court expressly states otherwise, we do not agree with the position of some commenters that the mere recitation of the Court's decision in *Red Lion* is sufficient to definitively resolve the complex constitutional issues presented by the doctrine.[36]

16. We now turn to identifying the standard of review appropriate to restraints on broadcast speech. In ascertaining whether or not a particular broadcast regulation comports with the First Amendment, the United States Supreme Court historically has applied standards which are different from those governing "the traditional free speech case."[37] Specifically, the Court has asserted that the utilization by the broadcast media of a public resource justifies the application of what it characterizes as "an unusual order of First Amendment values."[38] Under this bipartite standard, the interest of the public under the First Amendment is paramount.[39] The second part of this standard recognizes the

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the *National Broadcasting Co.* case was decided and rivals and perhaps surpasses the number of newspapers and magazines in which political messages may effectively be carried, it seems unlikely that the First Amendment protections of broadcast political speech will contract further, and they may well expand.

Loveday v. FCC, 707 F.2d 1443, 1459 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct. 1907 (1984); *See also Banzhaf v. FCC*, *supra* n.21; *Quincy Cable, TV Inc. v. FCC*, No. 83—1283 (D.C. Cir. July 19, 1985).

[36] Similarly, we do not believe that the mere fact that the fairness doctrine is a regulation of long-standing makes it invulnerable to First Amendment challenge. The United States Court of Appeals has stated that:

> It may well be that some venerable FCC policies cannot withstand constitutional scrutiny in light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets.

Banzhaf v. FCC, 405 F.2d at 1100.

[37] *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 101.

[38] *Id.*

[39] *Red Lion Broadcasting Co v. FCC*, 395 U.S. at 390. Contrary to the position of some commenters (*see, e.g.*, Reply Comments of Ecumedia) the general public has no First Amendment right to speak on broadcast frequencies. *See, e.g., Columbia Broadcasting System, Inc. v. Democratic National Committee*, *supra* n.13. The juxtaposing of speakers' and listeners' rights provides an important underpinning of the framework the Supreme Court has employed in analyzing constitutional constraints in the broadcast regulatory area. It suggests that some lessening of the rights of one group (speakers) is necessary to increase the

substantial rights of broadcasters under the First Amendment.[40] As the Court has recently stated, "broadcasters are 'entitled under the First Amendment to exercise 'the widest journalistic freedom consistent with their public [duties].' "[41] Indeed, restrictions on the First Amendment rights of broadcasters are upheld only if these are found to be narrowly tailored regulations necessary to vindicate the public's paramount right to receive information essential to a functional democracy.[42] This standard of review appears to have left broadcast speech in a position of protection less favorable than the printed media. This dichotomy is vividly presented by comparing the *Red Lion* and *Miami Hearald* cases, decided within five years of each other. Had the *Red Lion* court required of the Commission a showing of compelling state interest, as it required of the state of Florida in *Miami Herald*, it is doubtful that the fairness doctrine would have survived. But the *Red Lion* court found that scarcity and its effects had made a licensing scheme necessary and went on to conclude that that scheme afforded broadcasters a standard of review less protective than that accorded the print media.[43]

17. In light of the significant changes that have occurred in the communications marketplace, a number of commenters have taken

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rights of another (listeners and viewers). While such an analysis initially appears to provide a useful insight into why broadcast licensees receive differential treatment under the First Amendment, it conflicts fundamentally with what would appear to be the historic philosophy underlying the First Amendment. That is, that it is through the protection of the rights of speakers that the interest of society as a whole will best be protected.

[40] *See, e.g., Columbia Broadcasting System, Inc. v. Democratic National Committee, supra* n.13; *League of Women Voters of California v. FCC*, 104 S.Ct. at 3116-17.

[41] *FCC v. League of Women Voters of California*, 104 S.Ct. at 3116-17, *quoting CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981), *quoting Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 110.

[42] *Id.* at 3118.

[43] Although *Red Lion* was a unanimous decision, Justice William O. Douglas did not participate and four years later wrote "[m]y conclusion is that TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 148. (Douglas, J., concurring). Justice Douglas added, "I did not participate in that decision [*Red Lion*] and, with all respect, would not support it. The Fairness Doctrine has no place in our First Amendment regime." *Id.* at 154. And compare:

> We have been beginning, so to speak, in the wrong corner. The question is not what does the need for licensing permit the Commission to do in the public interest; rather it is what does the mandate of the First Amendment inhibit the Commission from doing even though it is to license.

H. Kalven, Jr., "Broadcasting, Public Policy and the First Amendment," 10 J.L. & Econ. 15, 37 (1967).

the position that the application of a disparate First Amendment standard to cases involving broadcast journalists is no longer appropriate. These parties argue that the constitutionality of the fairness doctrine and other cases involving broadcast journalists should be evaluated under the general constitutional standards that apply to the print media.[44] We would agree that the courts may well be persuaded that the transformation in the communications marketplace justifies the adoption of a standard that accords the same degree of constitutional protection to broadcast journalists as currently applies to journalists of other media. We do not believe, however, that it is necessary or appropriate for us to make that determination in this proceeding.

18. Administrative agencies are not tasked with the duty to adjudicate the constitutionality of a federal statute.[45] For the reasons set forth in detail below,[46] the issue as to whether or not the fairness doctrine is codified is not one which is susceptible of an easy resolution. Moreover, we are mindful that it is the province of the federal judiciary — and not this Commission — to interpret the Constitution.[47] We do not purport, therefore, to definitively resolve whether or not the fairness doctrine is constitutional. However, for several reasons we believe that it is appropriate for us to state our opinion on this issue. First, as noted above, constitutional considerations are an integral component of the public interest standard and we believe that an evaluation of the constitutionality of the doctrine is necessary in order to make a meaningful evaluation as to whether or not retention of the doctrine is in the public interest. Second, as the expert administrative agency charged by the Congress with the day-to-day implementation of broadcast regulation, we believe that our opinions on these matters provide a unique perspective which may prove useful.[48] Third, as noted above, in upholding the

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[44] *See generally* ¶¶ 9-11, *supra*.

[45] As the United States Supreme Court has stated, "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Johnson v. Robison*, 415 U.S. 361, 368 (1974), *quoting Oestereich v. Selective Service Board*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring in result). *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975).

[46] *See* Section V, *infra*.

[47] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

[48] The Supreme Court has stated that "in evaluating First Amendment claims . . . we must afford great weight to the . . . experience of the Commission." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 102. Moreover, in *FCC v. League of Women Voters of California*, the Court indicated that it may reevaluate the standard utilized in First Amendment cases if, *inter alia*, the Commission provides it with a "signal" that

constitutionality of the fairness doctrine in the *Red Lion* decision, the Supreme Court relied upon our representation that the fairness doctrine did not operate to inhibit the coverage of controversial issues of public importance; the evidence in this proceeding, however, compels the conclusion that this assumption is no longer valid.

19. We believe that there are serious questions raised with respect to the constitutionality of the fairness doctrine whether or not the Supreme Court chooses to continue to apply the less exacting standard which it has traditionally employed in assessing the constitutionality of broadcast regulation. As demonstrated *infra*, the compelling evidence in this proceeding demonstrates that the fairness doctrine, in operation, inhibits the presentation of controversial issues of public importance. As a consequence, even under a standard of review short of the strict scrutiny standard applied to test the constitutionality of restraints on the press, we believe that the fairness doctrine can no longer be justified on the grounds that it is necessary to promote the First Amendment rights of the viewing and listening public. Indeed, the chilling effect on the presentation of controversial issues of public importance resulting from our regulatory policies affirmatively disserves the interest of the public in obtaining access to diverse viewpoints. In addition, we believe that the fairness doctrine, as a regulation which directly affects the content of speech aired over broadcast frequencies, significantly impairs the journalistic freedom of broadcasters. As set forth in detail below, in light of the substantial increase in the number and types of information sources, we believe that the artificial mechanism of interjecting the government into an affirmative role of overseeing the content of speech is unnecessary to vindicate the interest of the public in obtaining access to the marketplace of ideas. Were the balance ours alone to strike, the fairness doctrine would thus fall short of promoting those interests necessary to uphold its constitutionality. And because the constitutionality of the fairness doctrine, in our view, is suspect under the less searching broadcast standard of review, *a fortiori*, it would prove constitutionally infirm under the more stringent First Amendment standard applicable in cases involving the print media.[49]

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technological advancements warrant such a reevaluation. *League of Women Voters*, 104 S. Ct. at 3116 n.11.

[49] Indeed, in light of the Supreme Court's decision in *Miami Herald Publishing Co. v. Tornillo*, *supra* n.15, it is clear that the fairness doctrine would not be constitutional were the Court to apply the general First Amendment standards

20. A number of commenters have argued that the limited availability of the electromagnetic spectrum is sufficient to justify the fairness doctrine. For example, the Media Access Project and the Telecommunications Research and Action Center ("MAP/TRAC") argue that:

> The most important justification for the fairness doctrine is that there are more individuals who want to broadcast than there are broadcast frequencies for the Commission to allocate. This continuing outstripping of supply by demand is the basis of the so-called "scarcity" rationale.[50]

While it is true that the limited availability of the electromagnetic spectrum may constitute a *per se* justification for certain types of government regulation, such as licensing, it does not follow that all other types of governmental regulation, particularly rules which affect the constitutionally sensitive area of content regulation, are similarly justified. As the United States Court of Appeals stated:

> First Amendment complaints against FCC regulation of content are not adequately answered by mere recitation of the technically imposed necessity for *some* regulation of broadcasting and the conclusory propositions that "the public owns the airwaves" and that a broadcast license is a "revocable privilege."[51]

21. In sum, while we recognize that the United States Supreme Court found that the fairness doctrine was constitutionally permissible sixteen years ago, we believe that the transformation of the broadcast marketplace and the compelling documentation of the "chilling effect" undermine the factual predicate of that decision. We will now specifically address the factors which, in our view, mandate a reassessment of our historical position that the fairness doctrine is consistent with the public interest.

III. A Number of Factors Justify a Reassessment of the Fairness Doctrine

A. The Need for and Costs of the Fairness Doctrine and its Actual

governing the print media.

[50] "Comments of Media Access Project and Telecommunications Research and Action Center" at 61 [hereinafter cited as "MAP/TRAC Comments"].

[51] *Banzhaf v. FCC*, 405 F.2d at 1100 (emphasis in original) (footnotes omitted). Indeed, notwithstanding its express recognition of the limited availability of the elctromagnetic spectrum in *FCC v. League of Women Voters of California*, the Court invalidated a statutory prohibition on editorializing by funded, non-commercial broadcast stations on the grounds that the statute violated the First Amendment rights of broadcasters. *FCC v. League of Women Voters of California*, *supra* n.18.

Effect on the Coverage of Controversial Issues of Public Importance.

22. As we stated in our *Notice*, the purpose in instituting this inquiry was to undertake a "searching and comprehensive reexamination of the fairness doctrine. . . ."[52] This reappraisal will consist of three parts: an exploration as to whether the doctrine furthers or impedes the regulatory and constitutional objectives it seeks to promote, an assessment of the potential costs and other detriments which may arise from the operation of the doctrine and an evaluation as to whether or not the communications marketplace has undergone such a transformation that the doctrine is no longer warranted or supportable.

23. As we stated above, the historic justification of the retention of the fairness doctrine, as a matter of policy, has been that government regulation is necessary to assure access to the "widest possible dissemination of information from diverse and antagonistic sources,"[53] to the listening and viewing public. While we have historically expressed our belief that the fairness doctrine, in operation, had the effect of expanding coverage of controversial issues on the nation's airwaves,[54] we have never specifically made an empirical assessment as to the efficacy of this chosen regulatory mechanism to promote access by the public to the marketplace of ideas. As a consequence, in this proceeding, we believe that it is essential to undertake a detailed evaluation as to whether or not the fairness doctrine in operation, enhances or inhibits the presentation of diverse views on public issues. In undertaking this evaluation, we will assess both the potential for the doctrine to chill the speech of broadcasters and review the

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[52] *Notice*, *supra* n.1. at ¶4.

[53] *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *1974 Fairness Report*, 48 FCC 2d at 3.

[54] *1974 Fairness Report*, 48 FCC 2d at 7. We have, however, always recognized the dangerous potential that the fairness doctrine, in operation, could have a "chilling effect" on the coverage of controversial issues of public importance. In fact, in the *1974 Fairness Report*, we stated that:

> there exists within the framework of fairness doctrine administration and enforcement the potential for undue governmental interference in the processes of broadcast journalism, and the concomitant diminution of the broadcaster's and the public's First Amendment interests.

Id. at 6. We have also indicated that if it were shown in actual operation that the doctrine either unnecessarily restricted the journalistic freedoms of broadcasters or impeded the right of the public to obtain access to diverse viewpoints on public issues, we would be compelled to reassess the policy. *See Notice of Inquiry* in Docket No. 19260, 30 FCC 2d 26, 28 (1971).

actual evidence presented by the commenting parties to determine whether the fairness doctrine impedes or inhibits access by the public to the marketplace of ideas.

24. Because a meaningful evaluation of an administrative policy necessarily involves an assessment of regulatory burdens, we shall also evaluate the costs and other potential detriments directly and indirectly borne by broadcasters, the Commission and the public at large which arise from the operation of the fairness doctrine. These costs do not merely include financial expenses but may also involve a restriction of cherished First Amendment values and an increased danger of government abuse.

25. Finally, in our comprehensive reappraisal of the fairness doctrine, we shall determine whether active government intervention in this constitutionally sensitive area involving content regulation is necessary or appropriate in promoting access to the marketplace of ideas. In determining whether or not there is a need to retain the fairness doctrine, we shall initially assess the nature and scope of the relevant market and then evaluate the sufficiency of antagonistic viewpoints available to the public in that market. We are particularly interested in ascertaining whether there have been significant changes in the number and variety of information sources available to the public which would attenuate the need for an artificial regulatory mechanism to assure that the public has access to diverse viewpoints on controversial and important issues.

B. The Fairness Doctrine in Operation Lessens the Amount of Diverse Views Available to the Public

1. Broadcasters Perceive That the Fairness Doctrine Involves Significant Burdens

26. A licensee may be inhibited from presenting controversial issues of public importance by operation of the fairness doctrine even though the first prong of that doctrine affirmatively requires the licensee to broadcast such issues.[55] The reason underlying this apparent paradox is that the two parts of the fairness doctrine differ markedly in the scope of the controversial issues that they encompass, the ease by which a licensee can meet the requirements embodied in the two prongs and the degree to which the

[55] Under the first prong of the fairness doctrine the licensee is required to provide coverage of controversial issues of vital importance to the community. *See, e.g., Friends of the Earth*, 24 FCC 2d 743, 750-51 (1970); *1974 Fairness Report*, 48 FCC 2d at 9-10; *Representative Patsy Mink*, 59 FCC 2d 987 (1976).

Commission, in the past, has taken affirmative action to enforce compliance with them.

27. It is well-established that a licensee, in complying with the first prong of the fairness doctrine, has broad discretion in determining the specific controversial issues of public importance that it chooses to present.[56] Indeed, in our *1974 Fairness Report*, we stated that "we have no intention of becoming involved in the selection of issues to be discussed, nor do we expect a broadcaster to cover each and every important issue which may arise in his community."[57] Rather, with respect to the affirmative obligation to cover controversial issues of public importance "[a] presumption of compliance exists"[58] and only "in *rare instances*, where a licensee has failed to give coverage to an issue found to be of critical importance to its particular community, would questions be raised as to whether a licensee had fulfilled its fairness obligations."[59] Indeed, the United States Court of Appeals has characterized this requirement as one which is "not extensive and [can be] met by presenting a minimum of controversial subject matter."[60]

28. In contrast to the paucity of challenges under the first part of the fairness doctrine, "[t]he usual fairness complaint . . . concerns a claim that the licensee has presented one viewpoint on a 'controversial issue of public importance' and has failed to afford a 'reasonable opportunity for the presentation of contrasting viewpoints.' "[61] The responsive programming obligation embodied in the second prong of the fairness doctrine arises whenever the licensee airs any controversial issue of public importance, even in situations where the issue broadcast is not

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[56] *See, e.g., 1949 Fairness Report*, 13 FCC at 1251.

[57] *1974 Fairness Report*, 48 FCC 2d at 10.

[58] *Memorandum Opinion and Order* in BC Docket No. 78-60, 89 FCC 2d 916, 925 (1982) (emphasis added).

[59] *Brent Buell*, 97 FCC 2d 55, 57 (1984) (emphasis added). *See Memorandum Opinion and Order* in BC Docket No. 78-60, 89 FCC 2d at 925; *1974 Fairness Report*, 48 FCC 2d at 10. As the United States Court of Appeals has stated:

> Throughout the history of fairness doctrine enforcement, much more attention has been given to th[e] second obligation — the provision of opposing points of view on controversial issues about which only one viewpoint has been broadcast — than to the first, namely, the affirmative obligation to provide coverage of controversial and important issues. The FCC has only once sustained a complaint relating to the part one obligation.

National Citizens Committee for Broadcasting v. FCC, 567 F.2d 1095, 1100 n.13 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978).

[60] *American Security Council Education Foundation v. FCC*, 607 F.2d at 444.

[61] *1974 Fairness Report*, 48 FCC 2d at 10.

"so critical or of such great public importance"[62] to trigger a requirement under the first part of the fairness doctrine.[63] An overwhelming majority of the complaints we receive and virtually all our orders directing licensees to take corrective action to conform to the requirements of the fairness doctrine involve the second prong of that doctrine.[64]

29. As a result of the asymmetry between its two components, the fairness doctrine in its operation encourages broadcasters to air only the minimal amount of controversial issue programming sufficient to comply with the first prong. By restricting the amount and type of controversial programming aired, a broadcaster minimizes the potentially substantial burdens associated with the second prong of the doctrine while remaining in compliance with the strict letter of its regulatory obligations.[65] Therefore, despite the first prong obligation, in net effect the fairness doctrine often discourages the presentation of controversial issue programming.[66]

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[62] *Id.*

[63] As the Court of Appeals has stated

> . . . issues giving rise to the part two obligation would not necessarily be required to be covered under the first obligation; the threshold which triggers the second fairness obligation is lower than that which triggers the first.

National Citizens Committee for Broadcasting v. FCC, 567 F.2d at 1100 n.13.

[64] *See generally* n.59, *supra*.

[65] One commentator has noted that:

> [L]icensees risk more by providing programming on controversial issues than by ignoring such issues; in only one case in the FCC's history has a complaint relating to the coverage requirement been resolved against a licensee. Hence, licensees are likely to assume that it is safer to ignore the coverage requirement than to risk balancing complaints. . . .
>
> [This] can only have the effect of encouraging licensees to avoid all but the most significant community concerns, discouraging the open debate of many important issues.

B. Chamberlin, "The FCC and the First Principle of the Fairness Doctrine: A History of Neglect and Distortion," 31 Fed. Comm. L.J. 361, 408-09 (1979) (footnotes omitted). *See also American Security Council Education Foundation v. FCC*, 607 F.2d at 459 n.5 (Bazelon, J., concurring).

[66] We do not believe that more stringent enforcement of the first prong would be an appropriate remedial response to the existence of a "chilling effect." Indeed, such an approach increases the severity of major detriments associated with the fairness doctrine. For example, contrary to the principles of the First Amendment, a stricter regulatory approach would increase the government's intrusion into the editorial decisionmaking process of broadcast journalists. It would enlarge the opportunity for governmental officials to abuse the doctrine for partisan political purposes. Were the chilling effect of the government sanction removed, the result might well be greater coverage of issues and thus more satisfaction of the policy behind the fairness doctrine's first prong. Moreover, a more stringent enforcement of first prong obligations would merely

30. There are a variety of reasons why a broadcaster might be inhibited from providing comprehensive coverage of controversial issues of public importance by operation of the fairness doctrine. One reason is the fear of government sanction. Under our regulatory scheme, a braodcaster must obtain a license from the Commission prior to entry into the broadcast field.[67] Because broadcast licenses are granted only for limited periods of time, all broadcasters must periodically renew that license if they wish to remain in business.[68] Compliance with the fairness doctrine is an important consideration in our determination as to whether renewal of a broadcast license is in the public interest.[69] Indeed, we have characterized the "strict adherence to the fairness doctrine .... as the *sine qua non* for grant of a renewal of license."[70]

31. Because a decision by this Commission to deny the renewal of a broadcast license is "a sanction of tremendous potency"[71] which can be triggered by a finding by this Commission that the licensee failed to comply with the fairness doctrine, a licensee has the incentive to avoid even the potential for such a determination.[72] Therefore, in order to attenuate the possibility that opponents, in a renewal proceeding, will challenge the manner in which a licensee provides balance with respect to the controversial issues it chooses to cover, a broadcaster may be inhibited from presenting controversial issue programming in excess of the minimum required to satisfy the first prong of the fairness doctrine.[73] As Chief Judge David Bazelon has stated, "[w]hen the

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increase the economic costs that are borne both by broadcasters and the Commission.

[67] 47 U.S.C. § 301 (1982).

[68] Section 307(c) of the Communications Act prohibits the Commission from granting a television license for a period exceeding five years or a radio license for a period in excess of seven years. 47 U.S.C. § 307(c) (1982).

[69] *See* 47 U.S.C. § 309 (1982).

[70] *Committee for the Fair Broadcasting of Controversial Issues*, 25 FCC 2 2d 283, 292 (1970); *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 944, 1008 (D.C. Cir. 1966) (Burger, C. J.). *See also 1974 Fairness Report*, 48 FCC 2d at 10.

[71] *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642, 666 (D.C. Cir. 1971), *rev'd sub nom. Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) (McGowan, J., dissenting).

[72] As Judge Leventhal recognized, "[f]airness rulings raise the problem of a chilling effect on broadcast journalism; the licensee "faces the possibility that the [controversial programming] will haunt [its] renewal applications." *National Broadcasting Company, Inc. v. FCC*, 516 F.2d 1180 (D.C. Cir. 1975), *cert. denied*, 436 U.S. 926 (1976) (Leventhal, C.J. concurring in part and dissenting in part).

[73] The evidence of record from a fairness doctrine supporter demonstrates that organizations have effectively used the threat of license revocation in fairness

right to continue to operate a lucrative broadcast facility turns on periodic government approval, even a governmental 'raised eyebrow' can send otherwise intrepid entrepreneurs running for the cover of conformity."[74]

32. While denial of a license renewal is the most severe sanction we can impose for failure to abide by the fairness doctrine,[75] it is not the only sanction.[76] Typically, upon a finding that a licensee has violated the fairness doctrine, we order the broadcaster to provide additional programming in order to redress the imbalance in time and frequency given to one side of a controversial issue.[77] Since broadcast time is a valuable resource, such a requirement

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doctrine negotiations in order to pressure broadcasters to give them air time for their specific programming. The Public Media Center ("PMC"), an organization which utilizes the fairness doctrine "to help various organizations secure air time for the expression of their views via the electronic media," ["Comments of the Public Media Center" at 1, n.1 (hereinafter cited as "PMC Comments")] has recounted one such instance in which an anti-nuclear coalition sought to obtain free advertising time from broadcast stations in order to present its views on a nuclear dumping controversy. PMC stated that:

> COND [the anti-nuclear coalition] made it clear that a Petition to Deny License Renewal would be filed if the fairness doctrine question went unresolved. *While it's unlikely the FCC would pull a license solely because of a fairness violation, most stations will do everything they can to avoid any kind of license challenge.* The cost of fighting a Petition to Deny is, after all, much higher the price of complying.

Id. at 14. (emphasis added). Although the stations offered to present the anti-nuclear viewpoint by means of a talk show, the coalition took the position that this offer was insufficient; instead it demanded that the responsive programming requirement of the fairness doctrine be met by the broadcast of specific spot advertising prepared by them. *Id.* at 14. The stations ultimately acceded to the coalition's demand. As PMC admitted, it was "[t]he implied threat of a license renewal challenge [which] increased the stations' desire for a negotiated settlement." *Id.* at 15.

[74] D. Bazelon, "The First Amendment and the 'New Media'—New Directions in Regulating Telecommunications," 31 Fed. Comm. L.J. 201, 206 (1979).

[75] A number of parties disagree that the power of the Commission to refuse to renew a station license has an inhibiting effect because the exercise of this power is sparingly used. For example, MAP/TRAC contend that "[l]icensees do not lose licenses for violation of the fairness doctrine in the coverage of an issue and the Commission knows it." MAP/TRAC Comments, *supra* n.50 at 137. We disagree. First, contrary to MAP/TRAC's assertion, we have in fact denied a license renewal on the basis of a fairness doctrine violation. *Brandywine Main-Line Radio, Inc.* 24 FCC 2d 18 (1970), *reconsideration denied*, 27 FCC 2d 565 (1971), *aff'd on other grounds*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973). Second, while we perceive the denial of a license renewal to be an extreme remedy which should not be lightly assessed, in light of the severity of this sanction, we believe that its mere potential has an inhibiting effect.

[76] *See* ¶52, *infra.*

[77] *See, e.g.*, Public Notice, "Controversial Issue Programming, Fairness Doctrine," FCC 63-734 (July 26, 1963), 25 RR 1899 (1963). *See generally Syracuse Peace Council*, FCC 84-518 (released December 20, 1984), 57 RR 2d 519 (1984).

imposes costs upon the licensee. In order to avoid these costs, a broadcaster may be inhibited from presenting more than a minimal amount of controversial issue programming.

33. The potential of a "chilling effect," however, is not restricted to the fear by a broadcaster that the Commission will find a violation of the fairness doctrine and impose sanctions on the licensee. A licensee may also be inhibited from presenting controversial issue programming by the fear of incurring the various expenses and other burdens which may arise in the context of fairness doctrine litigation regardless of whether or not it is ultimately found to be in violation of the doctrine.

34. As one broadcaster noted, licensees are "conscious of the probability that coverage of a highly controversial issue will trigger an avalanche of protests"[78] demanding air time for the presentation of opposing viewpoints. While most requests may be made in good faith, there is evidence that some complainants invoke a licensee's fairness doctrine obligations in an attempt either to pressure a broadcaster to censor specific programming[79] to harass licensees into presenting a particular spokesman or broadcast.[80] Whether or not the requests are legitimate, a station

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[78] "Comments of Tribune Broadcasting Co." at 9 [hereinafter cited as "Tribune Comments"].

[79] For example, PMC, a fairness doctrine supporter, describes a situation in which a coalition of organizations supporting legalized abortion invoked the fairness doctrine in their efforts to convince a Washington, D.C. television station, WJLA-TV, to cancel an anti-abortion film. PMC Comments, *supra* n.73 at 12. While the group was unsuccessful, in its Comments PMC recounts several situations, which are described *infra* at ¶¶ 48–49, in which complainants did in fact dissuade broadcasters from airing advertisements supporting or opposing ballot propositions. Similarly, as described at ¶ 44, *infra*, the National Association of Broadcasters ("NAB") recounts an instance in which a member of a religious cult, threatening to file a fairness doctrine complaint, successfully demanded the station to cancel a series on the religious organization. "Comments of the National Association of Broadcasters", App. Vol., App. D at 2 (Example No. 1) [hereinafter cited as "NAB Comments"].

[80] PMC describes the following situation in which an anti-nuclear group used the fairness doctrine to have its ballot propositions aired:

> Schwartzman [a Washington D.C. communications attorney] applied muscle in Washington.
>
> Inside forty-eight hours, every radio station had been contacted to find out which were running the industry ads .... [A] few refused to negotiate, claiming their news and public affairs coverage gave adequate balance.
>
> With Schwartzman's aid, a preliminary complaint was filed against the largest station by telegram on Thursday night.
>
> MNRC [the anti-nuclear group] also called the Chief of the FCC's fairness/political broadcast branch at home. On Friday morning, MNRC and the station's attorneys negotiated a settlement and the complaint was

nonetheless may incur additional personnel costs in negotiating with the group seeking responsive programming.

35. Broadcasters can also be deterred by the financial costs involved in defending a fairness doctrine complaint. The record reflects that such costs can be substantial. For example, a fairness doctrine complaint was brought against KREM-TV, a television station in Spokane, Washington charging the station with unbalanced coverage of a bond issue for an international exposition entitled "Expo-74."[81] While the Commission ultimately made the determination that the licensee did not violate the fairness doctrine, the administrative process extended for more than 20 months.[82] The licensee incurred legal costs of at least $20,000 and other expenses, such as travel expenses, significantly added to that total.[83] As the total profits reported by all three Spokane televisions stations in 1972 were approximately $494,000,[84] the financial burden borne by the station in defending

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withdrawn.

With this precedent, and more pressure from Schwartzman, every station that had carried the industry's ads was airing MNRC ads for free by Friday night.

PMC Comments, *supra* n.73 at 31. It is significant that PMC, in describing this scenario, does not dispute the stations' contention that they already were in compliance with the fairness doctrine by virtue of the fact that their news and public affairs programming provided adequate balance to the industry's advertisements. Rather, the objective of the anti-nuclear group, as expressed by PMC, was to have the stations broadcast their particular advertisements rather than to have the stations comply with the requirements of the fairness doctrine. It is also noteworthy that the complaint—which was withdrawn in less than one day—was filed against the "largest" station; the commenter did not state that the anti-nuclear coalition perceived that this station was in violation of the fairness doctrine. A number of other examples in which complainants invoked the fairness doctrine to demand that a licensee air a specific broadcast or present a specific spokesperson are described elsewhere in this *Report*. *See* ¶¶ 49-50, *infra*.

[81] *Sherwyn M. Heckt*, 40 FCC 2d 1150 (1973).

[82] The complaint was filed on September 8, 1971; the station responded on October 12, 1971 and the complainant replied seventeen days later. The licensee made further responses on December 2, 1971 and May 11, 1972. The Commission initiated a four-day field investigation on June 5, 1972. The Commission made an additional inquiry to the licensee on December 6, 1972 and the licensee responded on February 6, 1973. The Commission's staff issued a ruling vindicating the licensee on May 17, 1973. *Id.*

[83] *See* "Comments of Henry Geller and Donna Lampert," App. B at 2 [hereinafter cited as "Geller/Lampert Comments"]; "Comments of CBS, Inc." at 83 [hereinafter cited as "CBS Comments"]; "Comments of the Freedom of Expression Foundation" at 75 [hereinafter cited as "FEF Comments"]; NAB Comments, *supra* n.79 at 42.

[84] *See* Geller/Lampert Comments, *supra* n.83, App. B at 2; CBS Comments, *supra* n.83 at 84. Indeed, the station manager of KREM-TV testified that the fairness doctrine complaint resulted in a severe personal financial loss. *Freedom of*

this single fairness doctrine complaint was considerable. Moreover, in addition to the legal costs and other out-of-pocket expenses incurred by the station, the licensee was further burdened by the dislocation of normal operational functions that necessarily resulted from the significant amount of time expended by high-level management and station employees with respect to this matter.[85]

36. Another example of the significant financial burdens which can result from fairness doctrine litigation is the NBC award-winning[86] documentary on abuses in the private pension industry entitled "Pensions: the Broken Promise."[87] Determining that the program presented one side of the controversial issue of the "performance and need for regulation of private pension plans,"[88] the Commission found NBC was required to present contrasting viewpoints. While NBC was ultimately vindicated,[89] the administrative and judicial proceedings extended for four years and NBC incurred approximately $100,000 in legal costs in defense of the fairness doctrine complaint.[90]

Expression Act of 1983: Hearings Before the Senate Committee on Commerce, Science and Transportation, 98th Cong., 2d Sess. 129, 227 (1984) [hereinafter cited as "*1983 Hearings*"].

[85] The President and Vice-President of KREM-TV devoted 80 hours to the fairness doctrine complaint. In addition, the station manager and six members of the news staff spent 207 hours and 194 hours, respectively, on this matter. *See* Geller/Lambert Comments, *supra* n.83, App. B at 2-3; NAB Comments, *supra* n.79 at 42 and App. Vol., App. D at 19 (Example No. 17); CBS Comments *supra* n.83 at 84, n.**. Addditional time was incurred by secretarial or clerical employees.

[86] NBC received a Christopher Award, a National Headliner Award, an American Bar Association Award and the George Foster Peabody Award for its investigative documentary. "Comments of the National Broadcasting Co., Inc." at 16 [hereinafter cited as "NBC Comments"].

[87] *See, e.g., Notice, supra* n.1 at ¶¶ 73-75; NBC Comments, *supra* n.86 at 14-36; NAB Comments, *supra* n.79, App. Vol., App. D at 18 (Example No. 16).

[88] *Accuracy in Media, Inc. Against National Broadcasting Co.*, 44 FCC 2d 1027, 1043 (1973), *rev'd sub nom. National Broadcasting Co. v. FCC*, 516 F.2d 1101 (D.C. Cir. 1974), *reversal vacated and hearing en banc granted*, 516 F.2d 1155 (D.C. Cir.), *rehearing en banc vacated*, 516 F. 2d 1156 (D.C. Cir. 1975), *second reversal vacated as moot and remanded with direction to vacate initial order and dismiss complaint*, 516 F.2d 1180 (D.C. Cir.), *cert. denied*, 424 U.S. 910 (1976). The Commission subsequently vacated its order and dismissed the case as moot. *Accuracy in Media, Inc. Against National Broadcasting Co.*, 58 FCC 2d 361 (1976).

[89] The United States Court of Appeals reversed the Commission's *Order* but that decision was in turn vacated because the passage of legislation on private pension plans had rendered the decision moot. *See* n.88, *supra*.

[90] A further example involves the series of editorials critical of the Mayor of Milwaukee, other government officials and the city management aired by WTMJ. The Mayor, Henry Maier, filed a complaint with the Commission on June 5, 1981, arguing, *inter alia*, that the station had violated the fairness

37. Certain parties take issue with the contention that the fear of fairness doctrine litigation can have an inhibiting effect on the presentation of controversial issues of public importance.[91] In support of their position, these parties argue that the Commission requests broadcasters to respond to only a small number of the complaints it receives annually and, as a consequence, most broadcasters do not in fact incur such costs. The evidence of record in this proceeding, however, reflects that broadcasters are convinced that these costs can in fact be a significant inhibiting factor in the presentation of controversial issues.[92] Moreover, while it may be true that most broadcasters may not be confronted with actual fairness doctrine litigation, virtually all broadcasters do incur administrative and financial costs which result from presenting responsive programming and negotiating with complainants. Furthermore, in light of the fact that the costs involved in fairness doctrine cases which do proceed beyond the complaint stage can be prohibitively expensive, particularly to smaller stations, we believe that there is a substantial danger that many broadcasters are inhibited from providing controversial issues of public importance by operation of the fairness doctrine.

38. We also reject the contention that we should be unconcerned with the administrative and financial burdens that result from the fairness doctrine because they merely represent the cost of doing business. Indeed, the United States Supreme Court has recognized that financial considerations "may be markedly more inhibiting than the fear of prosecution under a criminal statute."[93]

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doctrine. This complaint was denied by the Broadcast Bureau application for review of this *Order* filed by the complainant was denied by the Commission and the United States Court of Appeals affirmed the Commission's *Order*. *Maier v. FCC*, 735 F.2d 220 (7th Cir. 1984). The administrative and judicial proceedings, however, extended for a period of three years. During the pendency of the appellate case, the Manager of Public Affairs of WTMJ, Mr. Ed Hinshaw, testified that defense of the fairness doctrine complaint had already caused the station to incur legal expenses in excess of $17,000. He also estimated that the management and staff time expended on the complaint to be more than two person months. *1983 Hearings*, *supra* n.84 at 146; NAB Comments, *supra* n.79, App. Vol. App. D at 21 (Example No. 18).

[91] "Reply Comments of Black Citizens for a Fair Media, Citizens Communications Center, League of United Latin American Citizens, National Association for the Advancement of Colored People, and National Association for Better Broadcasting" at 59 [hereinafter cited as "BCFM Reply Comments"]. For the reasons described above, we also reject the assertion of BCFM that the expenses incurred in responding to fairness doctrine complaints are not substantial. *Id.* at 59–60.

[92] *See e.g.*, NAB Comments, *supra* n.79, App. Vol., App. D at 5, 7, 21–22, 25–26 (Example Nos. 4, 6, 18, 20).

[93] *New York Times Co. v. Sullivan*, 376 U.S. at 277.

To the extent that the fear of incuring financial expenses discourages the presentation of controversial issues of public importance, important constitutional principles are thwarted; indeed such inhibition directly and adversely impacts upon "the principle [underlying the First Amendment] that debate on public issues should be uninhibited, robust and wide-open . . . ."[94]

39. In addition to the fear of incurring the administrative and financial costs attributable to fairness doctrine obligations, the mere accusation by a federal agency or even a complainant that a broadcast station has not abided by its responsibility to provide balanced coverage of controversial issues can have an inhibiting effect. A station is dependent upon the good will of its viewing or listening audience as a consequence, a station has a positive incentive to avoid a charge which may have the effect of lowering its reputation in the community. Broadcasters are acutely aware of the harm which may result from even a frivolous charge that the station violated the fairness doctrine. For example, WINZ, a radio station in Miami, Florida, initiated a petition drive in conjunction with the Dade County Consumer Affair's Office that was designed to persuade the Florida Public Service Commission to reduce or reject a rate increase proposed by Florida Power and Light Company. Despite the fact that the radio station was ultimately vindicated of any wrongdoing by the Commission, the general manager of the station testified that:

> I feel that Florida Power & Light used the fairness doctrine to provide themselves with a way to create adverse publicity for WINZ. The simple fact that they accused us of violating this rule created the impression we were wrong in undertaking the issue, even if that wasn't the case. Often the accused party suffers, whether right or wrong, only because they have been accused.[95]

40. Similarly, Mr. Bos Johnson, News Director of WSAZ-TV in Huntington, West Virginia, recounted a situation in which his station was subject to a fairness doctrine complaint during negotiations for the transfer of that station. He stated that:

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[94] *Id.* at 270.

[95] *1983 Hearings*, *supra* n.84 at 29 (testimony of Stan Cohen). *See also* FEF Comments, *supra* n.83 at 73-74; NAB Comments, *supra* n.79, App. Vol., App. D at 27-28 (Example No. 21). In addition to the damage to the reputation of the station, the stigma arising from an accusation that the station violated the fairness doctrine can have an adverse effect upon the station's employees. For example, Mr. Eugene Wilkin, the former general manager of KREM-TV in Spokane, Washington testified that the financial and emotional strain arising from an accusation that he violated the fairness doctrine was the main reason that he left broadcasting management, despite a career in that field spanning more than a decade. *See e.g.*, FEF Comments, *supra* n.83 at 75-76; NAB Comments, *supra* n.70, App. Vol., App. D at 32-33 (Example No. 24).

> It was a serious embarrassment to me professionally to feel responsible for the cost and effort of a Fairness Doctrine complaint in the midst of delicate business negotiations. And for the duration of those negotiations, while sitting at my desk working as a journalist, I was always aware of the large file containing information relating to the complaint.[96]

41. In sum, with the potential of government sanction; administrative, legal, and personnel expenses; and reputational costs, there is a significant danger that broadcasters will minimize their presentation of controversial issue programming in order to avoid the substantial dangers associated with the fairness doctrine. In the following section we shall evaluate the record evidence in order to ascertain whether or not broadcasters are in fact deterred from presenting controversial issue programming by operation of the fairness doctrine.

2. *The Record Demonstrates that The Fairness Doctrine Causes Broadcasters to Restrict Their Coverage of Controversial Issues.*

42. The record reflects that, in operation, the fairness doctrine — in stark contravention of its purpose — operates as a pervasive[97] and significant impediment to the broadcasting of controversial issues of public importance.[98] In spite of the difficulty generally encountered in establishing a "chilling effect,"[99] we find

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[96] NAB Comments, *supra* n.83, App. Vol., App. D at 34 (Example No. 25).

[97] The record reflects that the chilling effect resulting from fairness doctrine obligation is widespread. A recent survey of broadcasters in the Houston area revealed that the majority of responding parties with opinions stated that they were personally aware of instances in which programming has been suppressed as a direct result of the inhibiting effect of the fairness doctrine. "Comments of the Society of Professional Journalists, Sigma Delta Chi and the Legal Foundation of America" at 5-6 [hereinafter cited as "Society of Professional Journalists' Comments"].

[98] In our *1974 Fairness Report* we rejected the arguments of some broadcasters that in operation the fairness doctrine inhibited the coverage of controversial issues of importance to the public. In that proceeding, we stated that we have seen "no credible evidence that our policies have in fact had 'the net effect of reducing rather than enhancing the volume and quality of coverage.' *1974 Fairness Report*, 48 FCC 2d at 8, *quoting Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 393. As set forth in this section, however, the substantial and significant evidence presented in this proceeding demonstrates the existence of a pervasive and substantial "chilling effect" on the presentation of controversial issues by broadcasters. As a consequence, we can no longer conclude that the fairness doctrine operates to enhance, in either quantitative or qualitative terms, the amount of controversial issue programming available to the public.

[99] The United States Court of Appeals has stated that:

> Chilling effect is, by its very nature, difficult to establish in concrete and quantitative terms: the absence of any direct actions against individuals assertedly subject to a chill can be viewed as much as proof of the success of the chill as of evidence of the absence of any need for concern. To be sure,

that the evidence of record mandates the conclusion that the requirement that broadcasters provide balance in their overall coverage of controversial public issues in fact makes them more timid than they would otherwise be in airing programming that involves such issues.[100] We recognize that the first prong of the fairness doctrine requires licensees to present controversial issues of public importance to their viewers and listeners; as a consequence, we do not believe that the fear of fairness doctrine obligations typically results in a systematic avoidance of all controversial issues by broadcasters.[101] The record reflects, however, that the intrusion by government into the editorial decisions

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> where actual instances of harassment are established, or where past experience with similar regulation yields concerte evidence of a successful chill, the case is a stronger one. . . .

Community-Service Broadcasting of Mid-America, Inc. v. FCC, 593 F.2d 1102, 1118 (D.C. Cir. 1978).

[100] One example of this "timid" approach is recounted by the station manager of the Cornhusker Television Corporation. With the exception of programming produced by the network, he states that it is standard practice for the station not to accept nationally produced programming which discusses controversial subjects:

> The reason for this [policy] is although the producer says the program is objective in nature, we as licensees must be the sole judge of what is or is not controversial in order to act properly under the Fairness Doctrine. Also, is it true that what a producer in New York or Washington D.C. may consider objective, may not be defined in the same G way in Nebraska because as you know viewpoints vary drastically from one section of the country to another. Therefore, there are probably some good Public Affairs programs which we have decided not to run because the Fairness Doctrine might come into play and we would not be prepared to give reasonable access to opposing viewpoints.

NAB Comments, *supra* n.79, App. Vol., App. D at 38 (Example No. 27) (emphasis omitted). Notwithstanding the station manager's express representation that the avoidance of fairness doctrine obligations was the reason that the station rejected all non-network nationally-produced programming, BCFM nonetheless contends that this policy must be based on some other reason. BCFM argues that "if the station truly wished to avoid controversial subjects, it would review each program independently, "whether or not it was locally or nationally produced. BCFM Reply Comments, *supra* n.91 at 65. BCFM's argument, however, ignores the fact that a station may wish to lessen the amount of controversial public issue programming in order to minimize the burdens associated with providing access to opposing viewpoints without totally eliminating such programming, particularly in light of the fact a total elimination would subject the station to charges that it violated the first prong on the fairness doctrine. Furthermore, as noted above, the station manager affirmatively stated that the reason that station adopted this policy was to minimize the regulatory burdens associated with the fairness doctrine.

[101] At least one broadcaster, however, has candidly admitted that "his news staff avoids controversial issues as a matter of routine because of the Fairness Doctrine." NAB Comments, *supra* n.79, App. Vol., App. D at 5 (Example No. 4).

of broadcast journalists occasioned by fairness doctrine requirements overall lessens the flow of diverse viewpoints to the public to the detriment of the broadcasters and the public alike.

43. Journalists who have worked in both the broadcast and print media have testified that the very existence of the fairness doctrine creates a climate of timidity and fear, unexperienced by print journalists, that is antithetical to journalistic freedom. The inhibitions resulting from the interjection of a ubiquitous and brooding governmental presence into the editorial decisionmaking process is vividly described by Mr. Dan Rather, Managing Editor and Anchor of CBS News, as follows:

> When I was a young reporter, I worked briefly for wire services, small radio stations, and newspapers, and I finally settled into a job at a large radio station owned by the Houston Chronicle. Almost immediately on starting work in that station's newsroom, I became aware of a concern which I had previously barely known existed – the FCC. The journalists at the Chronicle did not worry about it; those at the radio station did. Not only the station manager but the newspeople as well were very much aware of this Government presence looking over their shoulders. I can recall newsroom conversations about what the FCC implications of broadcasting a particular report would be. Once a newsperson has to stop and consider what a Government agency will think of something he or she wants to put on the air, an invaluable element of freedom has been lost.[102]

44. The record reflects that broadcasters from television network anchors to small radio station journalists perceive the fairness doctrine to operate as a demonstrable deterrent in the coverage of controversial issues. Indeed, the record is replete with descriptions from broadcasters who have candidly recounted specific instances in which they decided not to air controversial matters of public importance because such broadcasts might

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[102] CBS Comments, *supra* n.83 at 72-73. Similar sentiments have been expressed by Mr. Bill Monroe, moderator and executive producer of the popular show "Meet the Press." He has stated that:

> Some years ago as a young man I worked for a newspaper. I was very impressed with the spirit of independence on the part of the editors of the newpaper. They didn't care if something they put in the paper offended a major political figure. Later I went to a television station and slowly I discovered that the managers of the television station were a little afraid of government. They were timid, conscious of government looking over their shoulder in a way that the newspaper publisher and editor for whom I had worked had not been. I began to feel I was a little bit less than free, and it worried me.

FEF Comments, *supra* n.83 at 69, *quoting* American Enterprise Insitute Roundtable, *Freedom of the Press* (July 29 and 30, 1975) published by the American Enterprise Institute for Public Policy Research, Washington D.C. (Statement of Bill Monroe before the National Press Club).

trigger fairness doctrine obligations. For example, fearing the imposition of onerous regulatory burdens, Meredith Corporation states that one of its stations elected not to air a paid program on the nuclear arms race.[103] As a result of this decision, the public was deprived of information on an important public issue. Similarly, Mr. J. T. Whitlock, the President and General Manager of the Lebanon-Springfield Broadcasting Company, testified that the fear of having to defend a fairness doctrine complaint was the reason that his station did not editorialize on an important local issue even though, in his editorial judgment, the situation ". . . cried for editorials by the station."[104]

45. As a further example, after work had begun in the preparation of a series on religious cults, the manager of a Southern California radio station decided that the series would not be broadcast. The decision to cancel this series was not based upon the editorial judgment of the broadcaster but rather upon an assessment of the legal and personnel costs associated with defending a possible fairness doctrine complaint.[105] Similarly, Mr.

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[103] "Meredith Corporation's Comments Regarding Notice of Inquiry" at 3. [hereinafter cited as "Meredith Comments"].

[104] NAB Comments, *supra* n.79, App. Vol., App. D at 29 (Example No. 22). BCFM contends that the decision not to editorialize "appears" to be based upon an incorrect perception that the "equal time" requirements of the political editorial rules are applicable in this situation. BCFM Reply Comments, *supra* n.91 at 69 n.32. *See* 47 C.F.R. §73.1930 (1984). It also asserts that any fairness doctrine obligations incurred by the station in the broadcast of this editorial "would probably have been met by its news coverage." BCFM Reply Comments, *supra* n.91 at 69 n.32. In our view, both arguments are speculative. There is nothing in the example to suggest either that the concern of the broadcaster was based upon the requirements of the political editorial rule or that the station's news coverage would have provided opposing viewpoints sufficient to meet the requirements of the fairness doctrine.

[105] NAB Comments, *supra* n.79, App. Vol., Vol D at 2 (Example No. 1). Two parties contend that this example lends no support for the existence of a "chilling effect," but we believe that their arguments lack merit. Citing *Religion and Ethics Institute, Inc.*, 42 RR 2d 1657 (1978), a Broadcast Bureau decision, MAP/TRAC argue that "[t]he Commission has repeatedly held . . . that discussion of religious doctrine and related issues are matters of private, not public controversy, and do not involve application of the fairness doctrine" ("Reply Comments of Media Access Project and Telecommunications Research and Action Center" at 39 [hereinafter cited as "MAP/TRAC Reply Comments]); as a consequence, MAP/TRAC contend that it was not reasonable for the broadcasters to be concerned about potential fairness doctrine litigation. The assertion that we have held that issues concerning religious doctrine to be *per se* beyond the scope of the fairness doctrine, however, is clearly erroneous. In fact, even *Religion and Ethics Institute* – the case cited by MAP/TRAC – noted that some issues concerning religious doctrine "must be considered controversial and of importance to the community at large" (42 RR 2d at 1659), thereby triggering fairness doctrine obligations. Indeed, the Commission has long asserted that "[t]he fairness doctrine extends to all expressions of views

Paul Jenson, the station manager of Cornhusker Television Corporation, asserted that the fear of fairness doctrine obligations precipitated his cancellation of a series of public announcements concerning inflation. Mr. Jenson testified that the only reason that these announcements were not aired was to avoid the presentation of opposing announcements mandated by the requirements of the fairness doctrine.[106] Another example in the record is the cancellation of a series on the B'nai B'rith by a Pennsylvania radio station. The series was not broadcast because the licensee felt that it could not afford the personnel time to respond to the complaints, the broadcast time to provide responsive programming or the potential legal fees resulting from complaints by perceived extremist groups.[107] In addition, a major Houston

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on controversial issues of public importance, whether or not they [would] be deemed religious views by some persons." *Brandywine Main-Line Radio, Inc.*, 27 FCC 2d 565, 570 (1971), *aff'd*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973). Indeed, in *Brandywine*, we refused to renew the station's license on the basis, *inter alia*, that it had violated the fairness doctrine with respect to its religious programming. Therefore, the argument of MAP/TRAC that it was patently unreasonable in this situation for the broadcaster to be concerned about potential fairness doctrine litigation is without merit.

BCFM argues that the broadcaster's fear of incurring the legal and administrative costs in defending a fairness doctrine complaint is irrational; Therefore it contends that the broadcaster was not reasonably inhibited by fairness doctrine obligations and, consequently, this example is not probative of a "chilling effect." BCFM Reply Comments, *supra* n.91 at 67. We have addressed the manner in which legal and administrative costs can result in a "chilling effect," *supra* at ¶¶ 35-36. We believe, therefore, that BCFM's assertion also is without merit.

[106] NAB Comments, *supra* n.79, App. Vol., App. D at 38-39 (Example No. 27). In an attempt to discredit this example, BCFM contends that the station manager was not reasonably inhibited by fairness doctrine obligations; it argues that no equal access for opposing views was required and contends that the station's obligation to provide reasonable access for opposing views "probably" would have been met by its news coverage. BCFM Reply Comments, *supra* n.91 at 69. BCFM provides no support for its asssertion concerning the adequacy of the station's news coverage in meeting the station's fairness doctrine obligations on this issue. In any event, we have no basis for disregarding the station manager's explanation for the reason for the cancellation of the series.

[107] NAB Comments, *supra* n.79, App. Vol, App. D at 62 (Example No. 42). While acknowledging that this example "implies" that the broadcaster's cancellation was induced by the fairness doctrine, BCFM contends that the broadcaster's actual concern was to avoid harassment by extremist groups and that this concern would exist without regard to fairness doctrine obligations. BCFM Reply Comments, *supra* n.91 at 62-63 n.30. We disagree. While a station may have to incur personnel costs in order to respond generally to complaints by the public in the absence of the fairness doctrine, the number of complaints — and consequently the amount of personnel costs — are necessarily increased when a station is obligated to comply with the fairness doctrine; moreover, the costs resulting from a requirement to provide additional "balanced" programming and the costs incurred in defending broadcast decisions clearly are

television station invited a former city official to address the issue of pay raises for police officers but, during the course of the interview, the former official also expressed his views on the issues of pay increases for firefighters and other municipal workers. Fearing to trigger additional fairness doctrine obligations, the station refused to air his views on these additional topics.[108]

46. Equally or perhaps even more disturbing than the self-censorship of individual broadcasts is the fact that the avoidance of fairness doctrine burdens has precipitated specific "policies" on the part of broadcast stations which have the direct effect of diminishing, on a routine basis, the amount of controversial material presented to the public on broadcast stations. For example, the owner of a broadcast station and two newspapers regularly prints editorials in his newspapers but, inhibited by regulatory restrictions, is reluctant to repeat the same editorials on his radio station.[109] Similarly, the Meredith Corporation acknowledges that one of its television stations has chosen "not to editorialize on matters of public importance, because of its concern that it does not have the resources necessary to seek out and provide exposure to opposing viewpoints in all instances."[110] Unfortunately, the policies of these stations are not atypical. In fact, a survey conducted by NAB in 1982 found that only 45 percent of responding stations had presented editorials in the preceding two years.[111] Moreover, the record reflects that even stations which do elect to editorialize are inhibited by fairness doctrine requirements. According to Mr. Donald Gale, News Director of KSL-AM, the regulatory burdens associated with the fairness doctrine were a crucial factor in the decision of his station not to air "guest editorials."[112]

47. Policies of stations that restrict public issue programming are not limited to editorials: they extend to the airing of political

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attributable directly to fairness doctrine obligations.

[108] Society of Professional Journalists' Comments, *supra* n.97 at 7-8.

[109] NAB Comments, *supra* n.79, App. Vol., App. D at 61 (Example No. 41). In its Reply Comments, MAP/TRAC characterize this example as "ignorant and meaningless" but provide no support for this pejorative appellation. MAP/TRAC Reply Comments, *supra* n.105 at 29.

[110] Meredith Comments *supra* n.103 at 3. *See also* "Comments of Arizona Television Company."

[111] NAB Comments, *supra* n.79 at 38. Moreover, in it Comments NAB describes an informal survey conducted its the Northwest regional conference which found at least 95 percent of the broadcasters, inhibited by regulatory concerns, did not speak out on local issues. *Id.*, App. Vol., App. D at 52 (Statement of Rev. Jim Nicholls) at 52 (Example No. 36).

[112] *Id.*, App. Vol., App. D at 11 (Example No. 11).

advertisements.[113] For example, as a direct result of fairness doctrine obligations, CBS acknowledges that its owned and operated stations, as a general matter, limit the amount of time they will sell both to persons seeking to place advertisements relating to ballot propositions and to political parties attempting to purchase broadcast time outside of campaign periods. CBS states that many of the television stations in four of the five markets in which those stations operate also either refuse or severely limit the sale of time for ballot proposition advertising.[114] Ms. Harriet Kaplan, the Chief Executive Officer of Station WAYS and WROQ-FM in Charlotte, North Carolina states that as a result of the regulatory obligations associated with the fairness doctrine, "I do not even let our sales department pursue political advertising. It is handled by a separate person. . . ."[115] The President and General Manager of WNJR Radio in Union, New Jersey also testified that she is "inclined to steer away from [political advertisements] because of the [regulatory] problems."[116] Similarly, Ms. Karen Maas, Vice President and General Manager of KIUP-AM and KRSJ-FM in Durango, Colorado states that her stations "think twice" about covering state ballot and related political issues.[117]

48. Moreover, the evidence of the "chilling effect" of the fairness doctrine, as applied to political advertisements, is not limited to the statements of broadcasters. For example, in its comments the Glass Packaging Institute ("GPI"), a trade association of the container glass industry which supports the retention of the fairness doctrine,[118] recounts its difficulties in placing advertisements on ballot issues:

> When various coalitions of which GPI was a member have sought to buy broadcast time for the presentation of views on ballot initiatives, many broadcasters have refused to consider their proposals. This refusal generally was occasioned not by normal market forces or broadcaster bias, but by broadcaster's unwillingness to assume the financial cost of providing free response time, as required by *Cullman*. In other instances, the coalitions' requests were met not by a broadcaster refusal to sell time, but, instead, by a rate purposely inflated to cover the anticipated cost of free response time being demanded by the coalitions' opponents on the ballot proposals. The result of these factors was that the coalitions found

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[113] *See, e.g.*, FEF Comments, *supra* n.83 at 64–65.
[114] CBS Comments, *supra* n.83 at 77, n.*.
[115] 1983 Hearings, *supra* n.84 at 224.
[116] *Id.*
[117] NAB Comments, *supra* n.79, App. Vol., App. D at 8 (Example No. 7).
[118] The Glass Packaging Institute, however, has urged the Commission to modify the Cullman Doctrine. "Comments of the Glass Packaging Institute" at 13.

> themselves unable to purchase broadcast time within which to address ballot issues, either because of a broadcast licensee's refusal to sell time, or because the time costs were prohibitive, both obstacles being the result of the broadcasters' fear of resulting *Cullman* obligations.[119]

Similarly, in its comments, the National Rifle Association of America ("NRA"), an organization which has also urged the Commission to retain the fairness doctrine, documented its difficulties in placing advertisements on ballot propositions. Like the GPI, the NRA attributed the reluctance of broadcasters to accept these advertisements on the fact that their acceptance would subject broadcasters to the responsive requirements of the fairness doctrine.[120]

49. The most compelling evidence of the existence of a "chilling effect" with respect to ballot advertising is presented in the Comments of the Public Media Center ("PMC"), an organization which, as noted above,[121] is actively involved in prosecuting complaints under the fairness doctrine. In its Comments, PMC vividly illustrates the manner in which a complainant can successfully pressure broadcasters into refusing to sell advertising on ballot issues. For example, PMC recounts the tactics of a pro-bottle bill coalition as follows:

> Ads opposing the beverage deposit – sponsored by an industry front group . . . hit the air in early August. Within ten days, [the pro-bottle bill coalition] sent a letter to all 500 California stations asking for a 2 to 1

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[119] *Id.* at 11-12. In *Cullman Broadcasting Co.*, 40 FCC 576 (1963), we stated that:

> where the licensee has chosen to broadcast a sponsored program which for the first time presents one side of a controversial issue, has not presented (or does not plan to present) contrasting viewpoints in other programming, and has been unable to obtain paid sponsorship for the appropriate presentation of the opposing viewpoint or viewpoints, he cannot reject a presentation otherwise suitable to the licensee – and *thus leave the public uninformed* – on the ground that he cannot obtain paid sponsorship for that presentation.

Id. at 577 (emphasis in original).

[120] In its Comments, the NRA stated that:

> In attempting to address controversial issues, including ballot propositions affecting the Second Amendment, *ad hoc* organizations formed by local firearms owners and other citizens often have been faced with a broadcast licensee who has elected to exercise its right to refuse all advocacy advertising. Invariably, this refusal is based . . . on an unwillingness of the broadcast licensee to risk the imposition of the financial penalty inherent in the *Cullman* obligation to invade its limited stock of commercial time in order to provide free response time to opponents on the issue.

"Comments of the National Rifle Association of America" at 32-33.

[121] *See* n.73, *supra*.

> ratio in free spot time. *[The coalition] urged broadcasters to refuse to sell time and therefore avoid a fairness situation at all.*[122]

The majority of the California stations followed the coalition's exortation. Less than one-third of the stations contacted by the coalition sold ballot advertising to the industry group.[123]

50. Similarly, PMC describes the successful invocation of the fairness doctrine by anti-smoking group in order to pressure broadcasters into refusing to sell advertising time to their opponents. PMC recounts that the anti-smoking group:

> . . . mailed "pre-emptive" letters to every local broadcast station, remarking on the upcoming vote and asking to be notified as soon as the tobacco industry bought airtime . . . . *[T]en Miami stations, seeking to avoid [the group's] predictable demands, simply refused to sell time to the industry front.*[124]

As a consequence, the public was denied information on a matter of important local concern.

51. In addition to political advertisements, the record reflects that the onerous requirements associated with the fairness doctrine have resulted in the widespread practice of many broadcasters to refuse to air any public issue advertisements. For example, one broadcaster employed by a large television station states that his station and six others under common ownership have a "company policy" not to accept issue advertising.[125] A number of trade associations have also documented that broadcast licensees, inhibited by the requirements of the fairness doctrine, have refused to air issue-oriented advertisements. The comments of the American Association of Advertising Agencies are illustrative:

> Many large corporations, consistent with a special expertise or interest in a specific public policy or issue, occasionally approach the broadcast media seeking to purchase air time for dissemination of public interest advertisements . . . . [B]roadcast licensees have regularly rejected offers for such advertisements — *not* because of some defect in the ads themselves, but rather because the Fairness Doctrine requires broadcasters

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[122] PMC Comments, *supra* n.73 at 28 (emphasis added).

[123] *See id.*

[124] *Id.* at 16–17 (emphasis added).

[125] NAB Comments, *supra* n.79, App. Vol., App. D at 11 (Example No. 10). Similarly, as noted by the United States Court of Appeals in *Maier v. FCC*, 735 F.2d 220, 234 n.19 (7th Cir. 1984), WTMJ-TV, a broadcast station in Milwaukee, Wisconsin has a "station policy that '[t]ime is not sold for the discussion of controversial issues.' "

> carrying paid public interest advertisements to carry opposing viewpoints as well — even if no one steps forward to pay for them.[126]

Similarly, the Association of National Advertisers, a trade association composed of companies which employ advertising in the marketing of goods and services to the public, documents that its members wish to present their views on issues of public controversy but are often "frustrated by rejections at the hands of broadcast licensees who claim that to accept such paid communications will subject them to onerous balancing obligations because of the Fairness Doctrine . . . ."[127]

52. The inhibiting effect of the fairness doctrine on the presentation of issue-oriented advertising is vividly illustrated in the comments of Mobil Corporation, another party who actively supports the retention of the fairness doctrine. Relying on its "considerable experience" in this area, Mobil recounts that it has been thwarted in its efforts to provide the public with its side of public issue as a result of "the broadcasters' outright refusal to permit the presentation of conflicting views on particular issues of public importance."[128] In stark contrast to this experience, Mobil states that the "print media has been willing to sell space for Mobil to present its views, and has never disagreed with the substance or placement of materials . . . ."[129] While Mobil itself does not attribute its difference in treatment to the regulatory burdens associated with complying with the requirements of the fairness doctrine, evidence in the record, which we find persuasive, indicates that the refusal of many broadcasters to air Mobil's advertisements was in fact based upon a concern that the commercial would trigger requests for the broadcast of responsive viewpoints under the fairness doctrine.[130]

53. Further evidence of the demonstrable inhibiting effect of the fairness doctrine is documented by our own administrative decisions. Except in extremely rare situations, a licensee is not challenged under the fairness doctrine for a failure to air a specific

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[126] "Comments of the American Association of Advertising Agencies in Furtherance of the Commission's Inquiry to Support Repeal of the Fairness Doctrine" at 3-4 (emphasis in original). *See also* "Comments of the American Advertising Federation"; "Comments of the Association of National Advertisers Inc." [hereinafter cited as "ANA Comments"]. *See also* NAB Comments, *supra* n.79, App. Vol., App. D at 30-31 (Example Nos. 23).

[127] ANA Comments, *supra* n.126 at 2.

[128] "Comments of Mobil Corporation," at 3-4 [hereinafter cited as "Mobil Corp. Comments"].

[129] *Id.* at 4.

[130] NAB Comments, *supra* n.79, App. Vol., App. D at 60 (Example No. 40).

controversial issue of importance to the community;[131] rather, the typical fairness doctrine case addresses whether the licensee provided overall balanced coverage with respect to those issues which, in its discretion, it chose to present. As a consequence, in those instances in which we determined that the licensee failed to broadcast a sufficient amount of responsive programming which is mandated under the second prong of the fairness doctrine, we have imposed sanctions — including the ultimate penalty of non-renewal — upon broadcasters who have actually provided large amounts of controversial issue programming. With respect to these broadcasters, the anomalous result of enforcing the second prong of the fairness doctrine is to inhibit or silence licensees who make significant contributions to the marketplace of ideas.[132]

54. *Brandywine-Main Line Radio Inc.*,[133] a case involving the license renewal of WXUR, is a vivid illustration of the way in which application of the fairness doctrine has operated to stifle controversial issue programming. The uncontroverted evidence of that case demonstrated that "controversial issue programming was a substantial part of WXUR's total programming"[134] during

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[131] *See, e.g., Brent Buell*, 97 FCC 2d 55, 57 (1984). As we stated in our *1974 Fairness Report*, "the usual fairness complaint does not involve an allegation that the licensee has not devoted sufficient time to the discussion of public issues." *1974 Fairness Report*, 48 FCC 2d at 10. Indeed, on only one occasion have we determined that the licensee acted unreasonably in failing to cover a specific controversial issue of paramount importance to the community. *Representative Patsy Mink*, 59 FCC 2d 987 (1976).

[132] In making this assertion, we do not — and cannot — pass judgment on the wisdom or propriety of the viewpoints expressed. Indeed, the Commission may conclude that a licensee makes a significant contribution to the marketplace of ideas, even though the Commission—or a majority of the public — may disagree or even abhor the opinions expressed by the licensee. As the United States Supreme Court has stated, "it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *FCC v. Pacifica Foundation*, 438 U.S. 726, 745-46 (1978). The presentation of diverse viewpoints on controversial issues of public importance enables members of the public, rather than any governmental entity, to accept or reject the different attitudes and viewpoints; the exposure to the marketplace of ideas, therefore, provides the public with the means to understand the vital issues of the day.

[133] *Brandywine-Main Line Radio Inc., supra* n.75.

[134] *Id.*, 24 FCC 2d at 22. Indeed, the Initial Decision noted that:

> In the broad perspective of this record, it is almost inconceivable that any station could have broadcast more variegated opinions upon so many issues than WXUR .... The multitudinous seas of opinion were navigated in what seemed to be a breathtaking course and this, indeed, was a main cause of the station's difficulties—not that it was narrowly partisan but that it sought and received too much controversy.
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> * * * *
>
> There is a strange irony in the fact that WXUR has attempted to do

its term of license. The Commission also found that the station did provide some coverage of opposing viewpoints, but the Commission determined that the station did not satisfy the requirement of overall balance in its public issue programming, as "those holding viewpoints contrary to those of the moderator were forced to give their views in an antagonistic setting."[135] As a consequence, the Commission refused to renew the license of WXUR.

55. The Commission's decision in that case had the direct result of reducing the amount of controversial issue programming available to the public. Chief Judge David Bazelon, in dissent to the Court of Appeals' affirmance, stated that WXUR was:

> a radio station devoted to speaking out and stirring debate on controversial issues. The station . . . propogate[d] a viewpoint which was not being heard in the greater Philadelphia area. The record is clear that through its interview and call-in shows it did offer a variety of opinions on a broad range of public issues, and that it never refused to lend its broadcast facilities to spokesman of conflicting viewpoints . . . .
>
> The Commission's . . . decision, has removed WXUR from the air. This has deprived the listening public not only of a viewpoint but also of robust debate on innumerable controversial issues. It is beyond dispute that the public has lost access to information and ideas. This is not a loss to be taken lightly, however unpopular or disruptive we might judge these ideas to be.[136]

56. A number of parties characterize the statements made by broadcasters that document the existence of "chilling effect" as mere "self-serving" utterances to which the Commission should accord little probative value.[137] Because these broadcasters at most merely recount their "personal beliefs about the effect of the Doctrine on programming practices,"[138] these parties argue that their statements do not substantiate the proposition that the overall effect of the fairness doctrine is to inhibit the presentation

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what broadcasters have been exorted to do and that is to offer vigorous discussion of controversial issues. *The station has, in fact, presented such discussion in about the same degree that most stations offer entertainment.*

Brandywine-Main Line Radio, Inc., 24 FCC 2d 42, 130-131 (1970), *rev'd*, 24 FCC 2d 18 (1970), *recon. denied*, 27 FCC 2d 565 (1971), *aff'd*, 473 F.2d 16 (D. C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973). (Initial Decision of Hearing Examiner H. Gifford Irion) (emphasis added).

[135] *Brandywine-Main Line Radio, Inc.*, 24 FCC 2d at 23.

[136] *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 70 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973) (Bazelon, C. J. dissenting) (emphasis omitted).

[137] *See, e.g.*, "Reply Comments of the American Civil Liberties Union" at 9 [hereinafter cited as "ACLU Reply Comments"]; MAP/TRAC Reply Comments, *supra* n.105 at 36.

[138] *See* ACLU Reply Comments, *supra* n.137 at 10.

of controversial issues of public importance.

57. We disagree. Because the existence of a "chilling effect" is a subjective perception, the statements of broadcasters who are personally subject to its requirements on a daily basis are able to present some of the best evidence on whether or not the doctrine, in operation, inhibits the presentation of controversial issues of public importance. We also believe that this evidence is more probative than the statements of persons who, by necessity, have to second-guess the broadcaster's state of mind.

58. In addition, we reject the proposition that the evidentiary value of these statements is undercut by their alleged "self-serving" nature. A statement by a broadcaster that he or she is inhibited from presenting controversial issues of public importance is, in a very real sense, an admission against interest. Such a statement may constitute an acknowledgement that the broadcaster may not be abiding by the highest standards of professional journalism, thereby potentially diminishing his or her standing in the profession. In addition, it could create potential regulatory problems for the broadcaster.[139] Further, while it is true that these statements evidencing a "chiling effect" are "self-serving" in the sense that the broadcasters who made them have a direct interest in the outcome of this proceeding, the identical charge could be leveled against every statement of every commenting party. We have never held that the evidence of interested parties lack probity; indeed, were we to adopt such a rule it would be virtually impossible for us to come to any conclusions about any issue raised in this proceeding.

59. Some parties to this proceeding attempt to support the absence of a "chilling effect" by asserting that most broadcasters either support the doctrine or at a minimum deny that it inhibits their speech.[140] We find this argument to be unpersuasive. Virtually all broadcasters or their trade associations which commented on this issue took the position that the fairness doctrine operates as a significant deterrent to the presentation of controversial issues of public importance.[141] There was only one

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[139] The United States Supreme Court has stated that "if present licensees should suddenly prove timorous [in presenting controversial issues of public importance], the Commission is not powerless [to redress the situation]." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 391. In light of this judicial warning, a licensee may believe it imprudent to acknowledge that it has in fact been timorous, thereby inviting potential regulatory litigation.

[140] *See, e.g.*, BCFM Reply Comments, *supra* n.91 at 50-54; PMC Comments, *supra* n.73 at 7-9.

[141] *See, e.g. "Comments [of National Radio Broadcasters Association] on Reassessment of the Fairness Doctrine," at 8; NAB Comments, supra* n.79, App. Vol.,

broadcaster on the record of this proceeding which voiced its support for the fairness doctrine as a matter of policy.[142] Moreover, the second-hand accounts of support of the doctrine by broadcasters that are contained in the pleadings of some proponents of the doctrine are directly contradicted by the statements of the broadcasters themselves in this proceeding.[143] Furthermore, we do not believe that the isolated representations of some broadcasters to the effect that the doctrine does not have any effect on the type, frequency or duration of the controversial viewpoints they air are probative of an absence of chilling effect within the industry as a whole; the fact that some broadcasters may not be inhibited in the presentation of controversial issues of public importance does not prove that broadcasters in general are similarly uninhibited.

60. Some parties assert that any inhibiting effect of the fairness doctrine is not attributable to the actual requirements of the doctrine itself but rather to the misperception of broadcasters as to their precise obligations under the doctrine. These commenters contend that broadcasters are not inhibited by the fear of incurring fairness doctrine obligations unless regulatory requirements in fact attach to their programming.[144] However, broad-

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App. D; "Joint Comments of Radio-Television News Directors Association" at 60-65; CBS Comments, *supra* n.83 at 70-98; NBC Comments, *supra* n.86 at 9-52; Tribune Comments, *supra* n.78 at 8.

[142] "Comments of Group W [Westinghouse Broadcasting & Cable Co.]" at 6-7 [hereinafter cited as "Group W Comments"].

[143] For example, in its Reply Comments, BCFM contends that it "is not the case" that "a majority of licencees, or at least the major networks, . . . oppose the [fairness] doctrine." BCFM Reply Comments, *supra* n.91 at 50. It states further that "NBC, CBS and ABC do not share NAB's view that the doctrine inhibits their speech." *Id.* at 50-51. Based upon the pleadings submitted by broadcasters in this proceeding, these representations appear erroneous. As noted above, the record reflects that the overwhelming majority of broadcasters participating in this inquiry oppose retention of the fairness doctrine. Moreover, with respect to the networks, NBC and CBS filed lengthy comments in this proceeding urging the Commission to eliminate the doctrine; one reason that these parties took this position was that they perceived the doctrine to have a chilling effect upon the speech of broadcasters. NBC Comments, *supra* n.86 at 8-9; CBS Comments, *supra* n.83 at 70-77. Furthermore, expressing the view that the total repeal of the fairness doctrine is a long term goal, ABC urged the Commission to adopt proposals for "major overhaul of the fairness doctrine" to "further enhance the First Amendment rights of broadcast journalists. "Reply Comments of American Broadcasting Companies, Inc." at 5. Indeed, BCFM actually characterizes ABC's proposals as designed "to exempt broadcasters from every meaningful obligation under the fairness doctrine . . . ." BCFM Reply Comments, *supra* n.91 at 74. It is clear, therefore, that the statements of the networks in the record of this proceeding are directly at odds with BCFM's representation that these parties support the fairness doctrine.

[144] *See, e.g.*, BCFM Reply Comments, *supra* n.91 at 66-69; MAP/TRAC Reply

casters are not lawyers. A broadcaster may be uncertain as to the precise boundaries of our detailed and complex regulatory scheme[145] or may be uncertain as to whether he or she will be able to convince us, in the course of fairness doctrine litigation, that the station's overall programming complies with our regulatory requirements. As a consequence, a broadcaster, in order to avoid even the possibility of litigation, may be deterred from airing material even though the Commission, after hearing all the evidence, would have concluded that the program did not trigger fairness doctrine obligations.[146] Indeed, the uncertainty as to whether or not a broadcast contains information which rises to the level of a controversial issue of public importance may itself have an inhibiting effect.[147] In any event, it is the fact of deterrence — not whether or not the Commission, in making an

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Comments, *supra* n.105 at 38-40.

[145] The regulatory requirements associated with the fairness doctrine are not as clear and unambiguous as the parties making this argument would have us believe. As noted in n.105 *supra*, BCFM argued that it was patently absurd for a broadcaster to decide not to air a series on religious cults on the basis that the series would trigger fairness doctrine obligations because religious matters are clearly beyond the scope of the fairness doctrine. Yet, contrary to BCFM's assertions, we have affirmatively stated that matters of religious doctrine, in appropriate circumstances, could precipitate fairness doctrine obligations. *See* n.105, *supra*; *Brandywine Main-Line Radio, Inc.*, 27 FCC 2d at 570.

[146] As the United State Supreme Court has stated:

> The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone . . . . This is especially to be feared when the complexity of the proofs and the generality of the standards applied provide but shifting sands on which the litigant must maintain his position.

Speiser v. Randall, 357 U.S. 513, 526 (1958) (citation omitted). *See also New York Times Co. v. Sullivan*, 376 U.S. at 279. *See generally Central Intelligence Agency against American Broadcasting Companies, Inc.*, No. 1862 (released Jan. 10, 1985), *application for review denied*, FCC No. 85-374 (adopted July 12, 1985).

[147] We have traditionally recognized that:

> One of the most difficult problems involved in the administration of the fairness doctrine is the determination of the *specific* issue or issues raised by a particular program. Those would seem to be a simple task, but in many cases it is not.

1974 Fairness Report, 48 FCC 2d at 12 (emphasis in original). As Chief Judge J. Skelly Wright of the United States Court of Appeals stated, "issue ambiguity in the fairness doctrine context is a certainty to lessen the free flow of information favored by the First Amendment, and is therefore unacceptable." *American Security Council Education Foundation v. FCC*, 607 F.2d at 458 (J. Skelly Wright, C. J. concurring). In enforcing the fairness doctrine, we are required, *inter alia*, to determine whether or not issues are "publicly important," "controversial," *etc.* Because our experience indicates that identifying and characterizing issues is inherently subjective, issue ambiguity under the fairness doctrine scheme appears unavoidable.

adjudicatory determination on the substantive law would in fact find a fairness doctrine obligation — which is relevant in ascertaining the existence of a chilling effect. As the United States Court of Appeals stated:

> In seeking to identify the chilling effect . . . . our ultimate concern is not so much with what government officials will actually do, but with how reasonable broadcasters will perceive regulation, and with the likelihood they will censor themselves to avoid official pressure and regulation.[148]

61. A number of commenters argue that there is no inhibiting effect because the Commission has been careful to administer the fairness doctrine in a manner which attenuates the regulatory burdens on broadcasters.[149] It is true that we have enforced the doctrine with a view toward minimizing editorial intrusion on broadcast journalists.[150] But the record in this proceeding has convinced us that the fairness doctrine generally operates to inhibit the presentation of controversial issues of public importance on the airwaves. Because the inhibiting effect is an inevitable result of the substantive rule itself, even carefully crafted implementing mechanisms have not been successful in preventing the fairness doctrine from operating to deter broadcasters from airing important and controversial issues. The mere fact that a more intrusive implementing approach might result in even greater restrictions on the editorial discretion of broadcast-

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[148] *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d at 1116.

[149] *See, e.g.*, Mobil Corp. Comments *supra* n.128 at 25-30; MAP/TRAC Comments *supra* n.50 at 128-133.

[150] *1974 Fairness Report, supra* n.3. Historically we have been concerned over the dangerous potential of the fairness doctrine to chill the speech of broadcasters. Consequently, in enforcing the doctrine we have adopted a number of procedural rules in an attempt to attenuate the intrusion on the editorial freedom of broadcast journalists. *Id.* For example, the Commission, as a condition precedent to filing a fairness doctrine complaint, requires a viewer or listener to first present his or her grievance to the broadcaster. *See, e.g., American Security Council Education Foundation v. FCC*, 607 F.2d at 445. We have also required a person filing a fairness doctrine complaint to establish a *prima facie* case. *See, e.g., Memorandum Opinion and Order on Reconsideration of the Fairness Doctrine Report* in Docket No. 19260 58 FCC 2d 691, 696 (1976), *aff'd sub nom. National Citizens Committee for Broadcasting v. FCC*, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978). *American Security Council Education Foundation v. FCC* 607 F.2d at 447. In addition, in implementing the doctrine, we have traditionally accorded a significant amount of discretion to broadcasters in the selection of the issues, the manner of coverage, the appropriate spokespersons, and the amount of time devoted to a specific matter. *See 1974 Fairness Report*, 48 FCC 2d at 16. *See also Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 FCC 598 (1964).

ers does not negate the existence of a demonstrable "chilling effect" under the present regulatory scheme.

62. Furthermore, noting that the Commission only forwards a small amount of complaints it receives to broadcasters for justification, several fairness doctrine proponents assert that the Commission fails to enforce its rules and, consequently, broadcasters are not reasonably deterred from airing controversial issues of public importance by operation of the fairness doctrine. We disagree. While it is true that we do not often determine, after review of a fairness doctrine complaint, that it is appropriate for us to request the broadcaster to explain how its programming comports with the fairness doctrine,[151] this fact merely demonstrates that the vast majority of fairness doctrine complaints we receive lack colorable validity. Instead of the improper action ascribed by some commenters, we believe that the paucity of actionable fairness doctrine complaints is probative of the fact that most licensees comply with the fairness doctrine.

63. In addition, several supporters of the retention of the fairness doctrine argue that the record in this proceeding provides inadequate support of a "chilling effect" on the grounds that the NAB, in the appendix to its comments, "merely" provided 45 examples of the way in which the fairness doctrine chills broadcasters' speech. These parties contend that the allegedly small number of examples are "wholly insufficient to suggest that the fairness doctrine has any inherent chilling effect on broadcasters."[152]

64. We find that this contention lacks merit for several reasons. First, the evidentiary support for our conclusion concerning the existence of a "chilling effect" is based, *inter alia*, on the pleadings of numerous parties, including individual broadcasters, corporations, industry groups, trade associations, non-profit corporations as well as the comments of the NAB. Second, even if the evidence of record were limited to the 45 examples contained in the appendix to NAB's comments — which it is not — we do not believe that 45 examples of chill can be discounted on the grounds that they are merely isolated incidents that are unrepresentative of the industry as a whole. This is particularly true in light of the fact that, as noted above, an admission by a broadcaster that the

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[151] *See, e.g., American Security Council Education Foundation v. FCC*, 607 F.2d at 447.

[152] MAP/TRAC Reply Comments, *supra* n.105 at 29. *See also* "Reply Comments of the United States Catholic Conference" at 8 [hereinafter cited as "USCC Reply Comments"].

fairness doctrine inhibits the presentation of controversial issues could be construed as involving a potential rule violation which broadcasters may be reluctant to acknowledge, especially in the record of the licensing regulatory agency.[153]

65. In addition, several parties challenge some of NAB's examples on the grounds that they involve application of the personal attack or political editorializing rule.[154] Noting that these specific applications of the fairness doctrine are the subject of a separate rulemaking,[155] they assert that these examples lack evidentiary value as to the "chilling effect" of the general fairness doctrine. To the contrary, we believe that examples of a "chilling effect" which involve application of the personal attack and political editorializing components of the fairness doctrine contained in the comments of NAB and other parties are probative of the general proposition that intrusive content-based regulation like the fairness doctrine and its ancilliary doctrines inhibit the presentation of controversial issues of public importance on broadcast frequencies.[156] In any event, while these examples do provide evidentiary support regarding the inhibiting effect of the

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[153] Contending that some of the examples cited by NAB are overly vague, anonymous, or otherwise fail to demonstrate that the fairness doctrine in actuality inhibits the presentation of controversial issues of public importance, certain parties argue that the Commission should accord little, if any, probative value to these examples. Contrary to this assertion, we believe that many of the examples contained in NAB's Comments provide substantial and convincing proof of the existence of a "chilling effect" and that the examples set forth by NAB are not so vague as to lack probative value. While some of the sources are unnamed, we note that the examples set forth by anonymous sources are similar to those which are attributed to specific broadcasters. Moreover, as noted above at ¶ 58 *supra*, there are legitimate reasons, unrelated to the probity of the representations, why some broadcasters may desire anonymity with respect to their statements that they were inhibited, by the fear of incurring fairness doctrine obligations, in their presentation of controversial issues of public importance. Furthermore, as noted in ¶ 64 *supra*, our concern is with the evidence contained in the record as a whole rather than with whether each example described by NAB contains specific evidentiary documentation of a "chilling effect."

[154] *See, e.g.*, MAP/TRAC Reply Comments, *supra* n.105 at 30; BCFM Reply Comments, *supra* n.91 at 68-69; ACLU Reply Comments, *supra* n.137 at 10.

[155] *Notice of Proposed Rule Making* in Gen. Docket No. 83-484, FCC 83-218 (released June 14, 1983).

[156] *See, e.g.*, NAB Comments, *supra* n.79, App. Vol., App. D at 35-37, 40-41, 46 and 62 (Example Nos. 26, 28, 31, and 42). *See also* "Comments of KIPR/95 FM"; "Comments of KGRL 940-AM Radio"; CBS Comments, *supra* n.83 at 77-78, n.*; FEF Comments, *supra* n.83 at 71-72, *citing Freedom of Expression Act of 1983: Hearings Before the Senate Committee on Commerce, Science & Transportation*, 98th Cong. 2d Sess. 125-126 (1984).

doctrine, our conclusion as to the existence of a "chilling effect" is in no way dependent upon these examples.[157]

66. Finally, in its Reply Comments, the Media Access Project and the Telecommunications Research and Action Center ("MAP/TRAC") contend that many of the examples of "chilling effect" contained in the NAB's Comments are merely "recycled material" which is of little evidentiary value. In support of this contention, MAP/TRAC recount that a number of these examples have been the subject of published books and articles, Commission proceedings or congressional testimony. With respect to the examples derived from the congressional hearings, MAP/TRAC assert that Congress, by rejecting or failing to enact legislation, found these examples to be unpersuasive.

67. We disagree. In our own view, the probity of these examples is not diminished merely because they have been published, formed the factual basis of an administrative proceeding or presented to Congress. To the extent that any evidentiary relevance attaches to the fact that the contents of a pleading has formed the subject matter of testimony presented under oath to the Nation's lawmakers, this fact would appear to enhance rather than lessen its probative value. Furthermore, contrary to MAP/TRAC's suggestions, the mere fact that Congress chose not to enact legislation does not constitute an affirmative determination on the part of the governing legislative body that the examples lack probity.[158]

68. In sum, we find that the evidence, derived from the record as a whole, leads us to conclude that the fairness doctrine chills speech. As a result of this finding alone we no longer believe that the fairness doctrine, as a matter of policy, furthers the public interest and we have substantial doubts that the fairness doctrine comports with the strictures of the First Amendment. Because the fairness doctrine inhibits the presentation of controversial and important issues, in operation, it actually disserves the purpose it was designed to achieve. In our view, an elimination of the doctrine would result in greater discussion of controversial and important public issues on broadcast facilities. While we believe that the existence of a "chilling effect is sufficient to support our policy conclusion, it is not the only basis upon which we make

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[157] In this regard, we note that none of the evidence of record demonstrating the existence of a "chilling effect" that is described in this section involves an application of the personal attack rule or the political editorializing rule.

[158] MAP/TRAC Reply Comments, *supra* n.105 at 27-28.

this determination. In the following sections we shall discuss other detriments attributable to the fairness doctrine.

C. The Administration of the Fairness Doctrine Operates to Inhibit the Expression of Unorthodox Opinions

69. While the fairness doctrine has the laudatory purpose of encouraging the presentation of diverse viewpoints, we fear that in operation it may have the paradoxical effect of actually inhibiting the expression of a wide spectrum of opinion on controversial issues of public importance.[159] In this regard, our concern is that the administration of the fairness doctrine has unintentionally resulted in stifling viewpoints which may be unorthodox, unpopular or unestablished.

70. First, the requirement to present balanced programming under the second prong of the fairness doctrine is in itself a government regulation that inexorably favors orthodox viewpoints.[160] As we stated in our *1974 Fairness Report*, it is only "major"[161] or "significant"[162] opinions which are within the scope of the regulatory obligation to provide contrasting viewpoints. As a consequence, the fairness doctrine makes a regulatory distinction between two different categories of opinions: those which are "significant enough to warrant broadcast coverage [under the fairness doctrine]"[163] and opinions which do not rise to the level

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[159] Governmental policy which has the effect of inhibiting the expression of specific points of view presents grave First Amendment concerns. As the United States Supreme Court has stated:

> the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.

FCC v. Pacifica Foundation, 438 U.S. at 745.

[160] Justice William Brennan has noted that the fairness doctrine may operate to disfavor viewpoints outside the mainstream of public opinion:

> Under the Fairness Doctrine, a broadcaster is required to present only "*representative* community views and voices on controversial issues" of public importance. Thus, by definition, the Fairness Doctrine tends to perpetuate coverage of those "views and voices" that are already established, while failing to provide for exposure to the public to those "views and voices" that are novel, unorthodox or unrepresentative of prevailing opinion.

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 190 (1973), *quoting Democratic National Committee*, 25 FCC 2d 216, 222 (1970) (Brennan, J., dissenting) (emphasis in original).

[161] *1974 Fairness Report*, 48 FCC 2d at 15.

[162] *Id.*

[163] *Id.*

of a major viewpoint of sufficient public importance[164] that triggers responsive programming obligations. While the broadcaster in the first instance is responsible for evaluating the "viewpoints and shades of opinion which are to be presented,"[165] we are obligated to review the reasonableness of the broadcaster's evaluation. As a consequence, the fairness doctrine in operation inextricably involves the Commission in the dangerous task of evaluating the merits of particular viewpoints. This evaluation has serious First Amendment ramifications. As the Supreme Court has stated:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . .[166]

71. Second, as Chief Judge David Bazelon has stated, our own administrative enforcement of the doctrine provides some support for the contention that some "controversial viewpoint[s] [are] being screened out in favor of the dreary blandness of a more acceptable opinion."[167] Broadcasters who have been denied or threatened with a denial of the renewal of their licenses due to fairness doctrine violations have generally not been those which have provided only minimal coverage of controversial and important public issues. Indeed, some licensees that we have not renewed or threatened with non-renewal have presented controversial issue programming far in excess of that aired by the typical licensee.[168] In a number of situations it was the licenses of broadcasters who aired opinions which many in society found to be abhorrent or extreme which were placed in jeopardy due to allegations of fairness doctrine violations.[169] In conclusion, we are

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[164] *Id.*

[165] *Id.*

[166] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

[167] *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d at 78 (Bazelon, C. J. dissenting).

[168] A discussion of our decision not to renew the license of WXUR on the basis, *inter alia*, of failing to comply with the fairness doctrine is described in detail at ¶¶ 54-55, *supra*. As noted below, in the name of the fairness doctrine we silenced WXUR, a station which had provided an enormous amount of controversial issue programming during its term of license. Similarly, in *Capitol Broadcasting Co.*, 2 RR 2d 1104 (1964), the Commission deferred action on the renewal applications of WRAL during a pendency of an inquiry into the station's compliance with the fairness doctrine notwithstanding the fact that the station's editorials, voiced by its Vice-President, Jesse Helms, presented views "on a *great number of controversial issues* of national and regional importance." *Id.* at 1106 (emphasis added).

[169] *See, e.g., Lamar Life Broadcasting Co.*, 38 FCC 1143 (1965), *rev'd sub nom. Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) (FCC refusal to grant a full term license to a station which espoused

extremely concerned over the potential of the fairness doctrine, in operation, to interject the government, even unintentionally, into the position of favoring one type of opinion over another.[170] To the extent that the doctrine has this effect it both disserves the interest of the public in an unencumbered marketplace of ideas and contravenes the fundamental purposes of the First Amendment.

D. In Operation the Fairness Doctrine Places the Government into the Intrusive and Constitutionally Disfavored Role of Scrutinizing Program Content

72. Although we have traditionally attempted to minimize our role in evaluating program content in administering the fairness doctrine,[171] the doctrine has the inexorable effect of interjecting the Commission into the editorial decisionmaking process.[172] In evaluating whether or not a broadcaster has met his or her balanced programming obligations under the fairness doctrine,[173]

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racially segregationist viewpoints); *Brandywine-Main Line Radio, Inc., supra* n.75 (FCC refusal to grant a license renewal to an evangelist station; the Hearing Examiner in *Brandywine* stated that the licensee's "style of presentation over the air — sometimes so racy as to make the gorge rise — was not what men of refined tastes would deem expedient. . . . *Brandywine-Main Line Radio, Inc.*, 24 FCC 2d at 130). *See also Trinity Methodist Church, South v. Federal Radio Commission*, 62 F.2d 850, 851 (D.C. Cir.), *cert. denied*, 284 U.S. 685 (1932) (Federal Radio Commission denied license renewal in a situation in which "the station had been used to attack a religious organization . . . [and where] the broadcasts [aired by the licensee] were sensational rather than instructive . . . . ")

170 In its Comments, the Office of Communication of the United Church of Christ — a party which intervened in opposition of a grant of renewal in the *Lamar Life* case — argues that in the 1960s extreme right wing broadcasters with odious racial and religious views gained an inordinate amount of influence in large sections of the country. Observing that these broadcasters were subject to fairness doctrine challenges, the United Church of Christ states that "[i]f the doctrine was successfully used to moderate abuses of that period, it served its purpose. . . ." "Comments of the Office of Communication of the United Church of Christ, the Unitarian Universalist Association, the Communication Commission of the National Council of the Churches of Christ in the U.S.A., Everett C. Parker and Al Swift" at 51 [hereinafter referred to as "UCC Comments"]. In our view, use of the fairness doctrine to suppress any point of view, however abhorrent, contravenes the purpose of the doctrine and raises serious constitutional implications.

171 *See, e.g., 1974 Fairness Report* at 8. *See American Security Council Education Foundation v. FCC*, 607 F.2d at 445.

172 *See Notice, supra* n.1 at ¶ 71.

173 Both prongs of the fairness doctrine have the potential to interject the government into the decisionmaking process as to the content of programming. The first prong of the fairness doctrine sanctions governmental intrusion by enabling the Commission to prescribe directly the coverage of a specific

we are obligated to determine whether or not the broadcaster made a reasonable determination as to whether or not the programming presented controversial issues of public importance, and if so, we must assess whether or not the broadcaster provided reasonable opportunities for the presentation of contrasting viewpoints. In evaluating the adequacy of the responsive programming, we have had to draw conclusions as to the reasonableness of the selected program formats and spokespersons.

73. Moreover, in making these assessments, we must necessarily take into account the amount of time in which a specific viewpoint was broadcast. Our staff often performs this task by mechanistically weighing the minutes and even the seconds of time devoted to each expression of opinion.[174] In addition, we must assess the frequency of the broadcast and the degree of audience exposure. Further, because the opportunity to present responsive programming may lose its utility if the controversial issue of public importance triggering the obligation subsequently becomes moot, we must also make judgments as to the timeliness of the opportunity for the discussion of contrasting viewpoints. The minute and subjective scrutiny of program content resulting from the enforcement of the fairness doctrine is at odds with First

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controversial issue of public importance whether or not the broadcaster, in the exercise of his or her journalistic judgment, would choose to cover the issue. As noted *supra* at n.59, however, we impose affirmative programming obligations on broadcasters under the first part of the fairness doctrine only in very rare instances. Because it is the second prong of the doctrine that typically involves the government into the editorial decisionmaking process, this section will address the intrusion resulting from the enforcement of that prong of the doctrine.

[174] At the *en banc* hearing, James C. McKinney, Chief of the Mass Media Bureau, described the detailed scrutiny of program content that necessarily results from the enforcement of the fairness doctrine:

> [I]t might be interesting for you to know the process that we go through here at the agency at the lower staff level before the Commissioners get [a case] for final decision. We . . . sit down with tape recordings [and] video tapes of . . . what has been broadcast on a specific station. We compare that to newspapers [and] other public statements that are made in the community. We try to make a decision as to whether the issue is controversial and whether it is of public importance in that community, which may be 2000 miles away. . . . [W]hen it comes down to the final analysis, we take out stop watches and we start counting [the] seconds and minutes that are devoted to one issue compared to [the] seconds and minutes devoted to the other side of that issue. . . . [I]n the final analysis we start giving our judgment as what words mean in the context of what was said on the air. What was the twist that was given that specific statement, or that commercial advertisement? Was it really pro-nuclear power or was it pro some other associated issue?

Hearings on the Fairness Doctrine: Panel IV (Statement of James C. McKinney) (February 8, 1985).

Amendment principles.[175] For example, in *Miami Herald*, the United States Supreme Court expressed concern that a governmentally mandated right of reply statute applicable to newspapers constituted an unwarranted intrusion on the editorial freedoms of journalists

> because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment and advertising. The choice of material to go into a newspaper, and the decisions made as to the limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of free press as they have evolved to this time.[176]

E. The Fairness Doctrine Creates the Opportunity For Intimidation of Broadcasters by Governmental Officials

74. Notwithstanding our recent efforts to reduce unnecessary regulatory burdens on licensees,[177] the broadcast industry is one which is characterized by pervasive regulation. The fact of this pervasive regulatory authority, including the intrusive power over program content occasioned by the fairness doctrine, provides governmental officials with the dangerous opportunity to abuse their opposition of power in an attempt either to stifle opinion with which they disagree or to coerce broadcasters to favor particular viewpoints which further partisan political objectives. In this regard, Chief Judge Bazelton has observed that "the potential to subject the 'fairness' theory to political abuse is

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[175] Justice William O. Douglas has expressed concern over the intrusive nature of the fairness doctrine:

> [T]he prospect of putting government in a position of control over publishers is to me an appalling one, even to the extent of the Fairness Doctrine. The struggle for liberty has been a struggle against Government. . . .
>
> The Court in today's decision by endorsing the Fairness Doctrine sanctions a federal saddle on broadcast licensees that is agreeable to the traditions of nations that never have known freedom of press and that is tolerable in countries that do not have a written constitution containing prohibitions as absolute as those in the First Amendment.

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. at 162-63 (Douglas J., concurring).

[176] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at 258.

[177] *See, e.g., Report and Order* in MM Docket No. 83-670, 98 FCC 2d 1076 (1984) [hereinafter cited as "*Television Deregulation*"]; *Report and Order* in MM Docket No. 84-19, FCC 84-156 (released May 9, 1984), 55 RR 2d 1389 (1984), *recon. denied*, FCC 85-225 (released May 8, 1985) (Elimination of Regional Concentration Rule) [hereinafter cited as "*Regional Concentration*"].

inherent in the operation of the doctrine."[178]

75. Political officials have not been loathe to criticize the manner in which broadcasters have aired controversial matters of public concern[179] and at times the criticism has been accompanied by overt pressure to influence the manner in which these issues are covered.[180] For example, a White House official during the Nixon Administration suggested to the President's Chief of Staff that the Administration respond to the alleged "unfair coverage" of the broadcast media by showing "favorites within the media," establishing "an official monitoring system through the FCC" and making "official complaints from the FCC."[181] The attempts to coerce broadcast journalists, moreover, have not been restricted to specific partisan viewpoints or politicians of a particular political party. As described in the *Notice*, a government official in another Administration was reported to state that the:

> massive strategy [of the Administration] was to use the fairness doctrine to challenge and harass the right-wing broadcasters and hope that the challenges would be so costly to them that they would be inhibited, and decide that it was too expensive to continue.[182]

We believe that the potential for the fairness doctrine to be abused in order to further partisan political purposes[183] has

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[178] *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d at 78 n.62 (Bazelon, C. J., dissenting).

[179] Chief Judge Bazelon has stated that:

> In the past years, networks have come under repeated attacks from government spokesmen who did not like the way television reported a variety of hot public issues. These attacks did not focus on inaccuracies but on the "bias" or lack of "fairness" in the presentation.

Id. at 78.

[180] An internal memorandum of one high level official of the Nixon Administration reveals that the President directed his staff on twenty-one occasions during a single thirty-day period to take "specific action relating to what could be considered unfair news coverage." Memorandum to H. R. Haldeman from Jeb S. Magruder, "The Shot-gun Versus the Rifle" (Oct. 17, 1969), *reprinted in* D. Bazelon, "FCC Regulation of the Telecommunciations Press," 1975 Duke L.J. 213, 247-51 (1975).

[181] *Id.* at 248.

[182] *Notice*, *supra* n.1 at 78.

[183] Even where there has been no explicit threats by governmental officials, a mere perception that such abuse could occur may itself have an inhibiting effect. Broadcasters may be inhibited from airing viewpoints distasteful to those in power to avoid potential retaliation. As Chief Judge David Bazelon has observed:

> the tremendous stakes in the highly concentrated television medium make the networks particularly sensitive to the prevailing political winds at the FCC, in Congress, and in the White House. And the government has fostered network sensitivity to government wishes by making clear that the failure to

dangerous policy ramifications. As Justice William O. Douglas has stated:

> the regime of federal supervision under the Fairness Doctrine is contrary to our constitutional mandate and makes the broadcast licensee an easy victim of political pressures and reduces him to a timid or submissive segment of the press whose measure of the public interest will now be echoes of the dominant political voice that emerges after every election.[184]

76. Several parties contend that we should not be concerned that the fairness doctrine has the potential to be used as a vehicle for governmental officials to improperly affect the viewpoints aired over broadcast frequencies because such governmental officials have other means, such as the license renewal process and Internal Revenue Service audits, by which to improperly attempt to exert control over broadcasters.[185] We disagree. While the commenters are correct in their assertion that governmental abuse may be effectuated by other mechanisms, we do not have plenary power to safeguard against all types of potential governmental abuse. Certainly the mere fact that alternative means of intimidation may be available does not provide justification for use to blithely ignore the fact that the fairness doctrine provides the dangerous potential for governmental abuse. As Chief Judge Bazelon has stated, "[w]ithout the FCC lever to manipulate, we could hope that there would be less chance that the licensees would be forced to kowtow to the wishes of an incumbent politician."[186]

F. The Fairness Doctrine Imposes Unnecessary Economic Costs Upon Broadcasters and the Commission.

77. In addition to the detriments described above, a further consequence of the fairness doctrine is the economic burdens imposed upon broadcasters and the Commission. As described above, the doctrine places significant economic costs upon a licensee. Such costs are incurred, for example, in negotiating with the public regarding responsive programming obligations, in

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respond to the government's concept of appropriate program content would jeopardize the all-valuable license. I am reminded by one broadcaster who observed: "We live or die . . . by the FCC gun."

Bazelon, "First Amendment and the New Media," *supra* n.74 at 78 (ellipsis in original).

[184] *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 164-65 (Douglas, J., dissenting).

[185] *See, e.g.*, Geller/Lampert Comments, *supra* n.83 at 10-11 n.4.

[186] Bazelon, "FCC Regulation," *supra* n.180 at 239.

defending fairness doctrine challenges in both administrative and judicial forums, in complying with the requirement to broadcast controversial issues of public importance, and in airing alternative viewpoints to these controversial issues.[187]

78. In addition to these economic burdens, the administration and enforcement of the doctrine imposes regulatory costs upon the Commission. We receive thousands of inquiries and complaints concerning the fairness doctrine annually,[188] each of which requires an individualized evaluation or response by our staff. In the course of assessing the merits of a complaint, the Commission's staff may seek further information from the Complainant. If it determines that the complainant has established a *prima facie* case, the staff may request justification from the licensee, thereby precipitating potentially costly administrative litigation, which, when terminated, is subject to judicial review, with its attendant costs.[189] Contrary to the position of some commenters,[190] therefore, we do not believe that the economic burdens incurred by the Commission in administering the fairness doctrine are *de minimus*.

79. In evaluating the propriety of a policy, the costs associated with the rule are to be balanced against its benefits. As a consequence, the significant economic costs associated with the administration of the fairness doctrine are a necessary factor in a considered evaluation of whether or not retention of the fairness doctrine comports with the public interest. By this assertion we do not imply that the administrative costs standing alone would be sufficient to justify the elimination of the doctrine. To the contrary, these costs might be justified were it demonstrated that the doctrine increased the amount of controversial issue programming and that its retention was necessary to assure that the public had access to the marketplace of ideas. In a situation in

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[187] *See* Section III, B.1, *supra*.

[188] For example, in 1984 our staff received 6,787 inquiries and complaints regarding the fairness doctrine.

[189] The United States Court of Appeals has recently determined that a complainant whose fairness doctrine claim is denied by the Commission has the right to seek judicial review (*Maier v. FCC*, *supra* n.125) and it is possible that this determination will increase the amount of appellate litigation, with its attendant costs, involving the fairness doctrine. Because appellate fairness doctrine litigation necessarily entails the involvement of Commission, the United States Department of Justice and the courts, the administrative expenses of each of these governmental agencies must be taken into account in assessing the economic burdens associated with the fairness doctrine.

[190] *See, e.g.*, MAP/TRAC Comments, *supra* n.50 at 134; "Comments of the American Civil Liberties Union" at 11 [hereinafter cites as "ACLU Comments"].

which there are no counterveilling justifications, however, we believe that even a moderate amount of administrative costs may consititute substantial justification for the elimination of regulation. For example, we have recently stated that regulatory costs are a significant criterion in justifying repeal of a rule "especially when the other factors considered indicate that the need for the rule has been effectively eliminated and that the rule imposes significant costs on both the public and the broadcast industry."[191] We find that these factors are applicable with respect to the fairness doctrine because, as discussed, the doctrine "chills" the broadcast of controversial issue programming and, as explained below, is not required to assure that the public has access to diverse viewpoints.

80. For the reasons set forth above, we find that the fairness doctrine, in operation, has the effect of inhibiting the presentation of controversial issues of public importance. We also believe that the doctrine operates to favor the expressions of orthodox viewpoints and to require unwarranted scrutiny by the Commission into program content. In addition, we find it provides a vehicle by which governmental officials can intimidate broadcasters for partisan political purposes. Moreover, we determine that the doctrine, in operation, imposes significant economic costs upon the Commission and the broadcasting industry. As a consequence, on the basis of the record in this proceeding, we conclude that there are a number of significant detriments associated with the fairness doctrine. In the following section we will evaluate, in light of the current communications marketplace, whether or not there is any need for us to retain the doctrine.

G. Need for the Fairness Doctrine In Light of the Increase in the Amount and Type of Information Sources in the Marketplace

81. Our conclusions regarding the disutility of the fairness doctrine find further support by examining the current amount of

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[191] *Memorandum Opinion and Order* in MM Docket No. 84-19 FCC 85-225 (released May 8, 1985) at ¶ 17. It is well-established that if the benefits of retaining a policy are minimal or non-existent, even a relatively small administrative burden may be sufficient to justify repeal. For example, in assessing whether or not to eliminate the regional concentration rule, one factor which we considered was the regulatory costs associated that rule. Finding that the administration of that rule had resulted in a staff analysis of 71 construction permits or assignment applications annually, we determined that "this expenditure of staff time . . . constitute[d] an appreciable burden on the Commission" (*id.*) despite the fact that there only were three reported cases involving the regional concentration rule over a two-year period. *Id.*

diverse and antagonistic sources of information available in the marketplace. As we observed in the *Notice*, significant increases in the number and variety of information sources attenuates the need for a system of government imposed "fairness" with its corollary duty to discover and present controversial issues of public importance. The Commission's last assessment of the information marketplace, and its necessary relationship to the legal and policy underpinnings of the fairness doctrine, occurred in 1974. At that time the Commission concluded:

> The effective development of an electronic medium with an abundance of channels through the use of cable or otherwise is still very much a thing of the future. *For the present*, we do not believe that it would be appropriate — or even permissible — for a government agency charged with the allocation of the *channels now available* to ignore the legitimate First Amendment interests of the public. (*emphasis added*) [192]

82. More than a decade has passed since this examination. During this time, we have witnessed explosive growth in various communications technologies. We find the information marketplace of today different from that which existed in 1974, as many of the "future" electronic technologies have now become contributors to the marketplace of ideas. As will be discussed below, the growth of traditional broadcast facilities, as well as the development of new electronic information technologies, provides the public with suitable access to the marketplace of ideas so as to render the fairness doctrine unnecessary. Moreover, we find that the dynamics of the information services marketplace overall insures that the public will be sufficiently exposed to controversial issues of public importance.[193] Accordingly, we no longer believe it appropriate to continue a system of government imposed obligations requiring licensees to discover and "fairly" address controversial issues of public importance. We believe that elimination of the fairness doctrine would not only promote discussion of such issues, but also pay greater fidelity to fundamental First Amendment values.[194]

83. Our analysis of the growth in the information services marketplace and the impact of this development on the underpinnings of the fairness doctrine shall begin with a discussion on the nature and scope of that market. We shall then evaluate the

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[192] *1974 Fairness Report*, 48 FCC 2d at 6.

[193] *See WNCN Listener's Guild v. FCC*, 450 U.S. 582, 594 (1981); *Office of Communications of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983) [hereinafter cited as *"UCC v. FCC"*].

[194] *See FCC v. National Citizens Committee for Broadcasting*, 436 U.S. at 795. (the public interest necessarily invites reference to First Amendment principles).

current status of this marketplace. Special emphasis will be given to the growth of information sources since the Supreme Court's decision in *Red Lion Broadcasting* and our previous evaluation of the communications marketplace in the *1974 Fairness Report*. As a final matter, we will address the availability of these information sources and the incentives to provide coverage to controversial issues of public importance.

1. Nature and Scope of the Information Services Marketplace

84. The Commission has previously addressed this specific issue in the context of a television station licensee's programming obligations. In our decision deregulating the programming guidelines for commercial television, we noted that the relevant information marketplace includes a variety of information sources such as cable television, Low Power Television (LPTV), Multipoint Distribution Service (MDS), Multichannel Multipoint Distribution Service (MMDS), Satellite Master Antenna Service (SMATV), and other electronic technologies.[195] Moreover, the Commission, in formulating its policy concerning a licensee's responsibility to provide programming directed at children, stated that broadcasters could consider the programming alternatives available on both cable and public television in deciding how to meet their own nondelegable duty.[196] This policy was later affirmed by the United States Court of Appeals.[197]

85. The Commission has also addressed the issue of determining the relevant information marketplace in fashioning its rules regarding concentration of ownership. For example, we took particular note of the rise in the multiplicity of nonbroadcast media voices when eliminating the regional concentration of control rules.[198] More recently, the Commission addressed this issue in a proceeding revising its national multiple ownership rules.[199] In this context the Commission noted:

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[195] *Television Deregulation*, 98 FCC 2d at 1086 and 1138.

[196] *Report and Order* in MM Docket No. 19142, 96 FCC 2d 634 (1984), *aff'd sub nom. Action for Children's Television v. FCC*, 756 F.2d 899, 901 (DC.. Cir. 1985) (per curiam) [hereinafter cited as *"ACT v. FCC"*].

[197] *ACT v. FCC*, 756 F.2d at 901.

[198] *See Regional Concentration*, *supra* n.177.

[199] *Report and Order* in Gen. Docket No. 83-1009, FCC 84-350, 49 Fed. Reg. 31877 (August 9, 1984), *recon. granted in part, Memorandum Opinion and Order*, FCC 84-638, 50 Fed. Reg. 4666 (February 1, 1985), *appeal docketed sub nom. National Association of Black Owned Broadcasters v. FCC*, No. 85-1139 (D.C. Cir. filed March 4, 1985).

> The record in this proceeding supports the conclusion that the information market relevant to diversity includes not only TV and radio outlets, but cable, other video media and numerous print media as well. In the *Notice*, we took account of the fact that these other media compete with broadcast outlets for the time that citizens devote to acquiring the information they desire. That is cable, newspapers, magazines and periodicals are substitutes in the provision of such information.[200]

That the various media are in fact information substitutes in the marketplace of ideas is further reflected in our local cable and television, newspaper and broadcast, radio and television cross-ownership rules.[201]

86. Against this background, the issue in this proceeding is whether or not there are inherent differences among various media outlets so as to prevent substitutability with respect to the presentation of controversial issues of public importance. We find nothing in this record which would cause us to arrive at a conclusion different from these prior decisions.[202] Accordingly, for the purpose of analyzing the fairness doctrine, we believe it is appropriate to consider traditional broadcast services, new electronic media and print as all part of the information services marketplace.

87. Several commenters argued that broadcasting, particularly television, is such a dominant information source that there are no other realistic information alternatives.[203] These commenters frequently point to studies indicating that television is both the primary and most believed source of information in the country.[204] We do not believe that the purported dominance of one media voice necessarily detracts from the significance of other voices with respect to the availability of antagonistic and diverse sources of information. The success of one particular medium in

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[200] *Id.* at 31880.

[201] *See* 47 C.F.R., § 73.3555(b) [one to a market]; 47 C.F.R. § 76.501 [co-located cable-broadcast TV cross-ownership]; and 47 C.F.R. § 73.3555(c) [co-located newspaper-broadcast cross-ownership.]

[202] Indeed, as we will discuss, *infra*, growth in the television and radio services alone may obviate the need for the fairness doctrine. *See* ¶ *104, infra.*

[203] *See, e.g.*, "Comments of General Motors Corporation, International Paper Company and Campbell-Ewaid Company on Notice of Inquiry" at 10, [hereinafter cited as "GM Comments"]; "Comments of the Democratic National Committee, Democratic Congressional Campaign Committee and Democratic Senatorial Campaign Committee at 7-8, [hereinafter cited as "DNC Comments"].

[204] Commenters generally cite to the *Roper Study* for the proposition that broadcasting, especially television, is the most utilized and the most believed source of news and informational programming. *See* The Roper Organization Inc., "*Public Attitudes Toward Television and Other Media in Time of Change*" May 1985 [hereinafter cited as the "*Roper Study*"].

attracting large audiences does not necessarily provide an appropriate justification for imposing governmently mandated fairness. Moreover, the data do not suggest that other media voices are somehow unavailable. Studies demonstrating the alleged dominance of television broadcasting are based on data in which television was selected as one of several information sources used by the respondents.[205] Such data merely serve to demonstrate the interchangeability of information options.[206]

88. Similarly, we are not persuaded by those who argue that newspapers and broadcast facilities are in different information markets because newspapers must be read as opposed to television or radio which may be casually watched or monitored.[207] For the purposes of the policies adopted herein, we can find no important regulatory distinction in the fact that an individual watches television, listens to the radio or reads a newspaper. That individuals edit and process information from the various media using different senses or while performing different tasks does not suggest that the information sources exist in separate isolated corners within the marketplace of ideas. In this regard, we believe that our regulatory concerns are best limited to considerations involving the *availability* of information sources. Concerns involving the manner in which the individuals mentally process the information from these outlets generally should not be of regulatory significance.[208]

89. A related argument concerns the fact that broadcasting, unlike almost all other media sources, is subject to substantial and direct government regulation.[209] We do not believe that a

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[205] In this regard, the *Roper Study* acknowledges that multiple answers have been accepted when people have named more than one medium. *Id.* at 3.

[206] Indeed, it appears that reliance on a particular media voice may depend on the type of issue *e.g.*, national, local etc. For example, a recent study published by the American Society of Newspaper Editors found that 50 percent of the respondents trusted newspapers more than television in trying to understand a difficult local news story. Only 37 percent of all respondents said they would trust television more in understanding local news. *Editor and Publisher*, Apr. 13, 1985, at 9.

[207] *See* MAP/TRAC Comments, *supra* n.50 at 75.

[208] Furthermore, we disagree with MAP/TRAC's contention that television broadcasting is unique because it has a captive audience. *Id.* at 76 n.76. MAP/TRAC's own analysis regarding the ability to listen to broadcasting while resting, working or driving is inconsistent with the captive audience hypothesis. Moreover, reliance on the Supreme Court's decision in *FCC v. Pacifica Foundation*, 438 U.S. at 749, as evidence of the captive audience theory is misplaced. The Supreme Court has acknowledged that the decision is limited to situations involving children and indecent language. *See FCC v. League of Women Voters*, 104 S.Ct. at 3118.

[209] *See, e.g.*, MAP/TRAC Comments, *supra* n.50 at 61.

system of government licensing affects the substitutability of information among the various media voices. While such a system may influence entry into the information services marketplace, a licensing scheme, in and of itself, does not provide a proper distinction for the purpose of assessing the impact of broadcasting as a diverse information voice.[210] Moreover, as we observed when adopting our co-located newspaper cross-ownership rules, nonregulated information sources may be considered in formulating Commission policy.

90. In addition, we do not believe that purported price differences among the various information sources necessarily place them in separate information markets. While programming from traditional advertiser based broadcast facilities has been considered a "zero priced good," there is no evidence in the record suggesting that the alleged price differentials between these facilities and other "pay" media are significant enough to preclude interchangeability among information systems.[211] Indeed, the monthly cost of a daily newspaper may be comparable to or even less than the monthly cost of basic cable service.

91. Several commenters suggested that newer technologies such as pay cable, STV, MDS, DBS are not adequate information substitutes with respect to the provision of issue related programming. As will be discussed *infra*, we believe there are sufficient incentives to insure the presentation of programming that addresses controversial issues of public importance. These incentives exist not only for traditional broadcast facilities, but also for the newer electronic technologies.[212]

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[210] In this regard, we note that even assuming costs associated with the limitations of the Commission allocations scheme, the actual barriers to entry in terms of capital costs, may be lower for radio and television broadcasting than for daily newspapers. *See* Wirth, Michael, *Economic Barriers to Entry Daily Newspapers vs. Television Stations vs. Radio Stations*, August 1984, *cited* in NAB Comments, *supra* n.79 App. Vol., App. C.

[211] We note that while there are no subscription fees for over-the-air broadcasting, there may be costs involved in viewing "free" over-the-air television. Such costs would take the form of opportunity costs lost while watching unwanted program material.

[212] *See* ¶¶ 129-131, *infra*. Some Commenters also argued that the newer electronic technologies will not provide coverage to local controversial issues. We find this argument unpersuasive. Existing fairness obligations regarding the coverage of controversial issues of public importance do not necessarily require that the issue be solely of local importance. In this regard, controversial issues confronting a particular community may be national in scope and may be sufficiently addressed by "national programming." Moreover, we note our prior decisions in which we observed that programming addressing local issues need not be produced at the local level. *See Television Deregulation*, 98 FCC 2d at 1085, *citing WPIX, Inc.*, 68 FCC 2d 381, 402 (1978)

92. In sum, we find the record in this proceeding supports the conclusion that the various print and electronic media exist in a widely diverse and competitive information marketplace. We now turn to a consideration of the current availability of these diverse media outlets.

2. Status of the Information Services Marketplace

93. As we observed in the *Notice*, there has been explosive growth in the communications marketplace since the inception of the fairness doctrine in 1949. Of particular significance is the development of the marketplace since the Supreme Court's decision in *Red Lion Broadcasting* in 1969 and our subsequent analysis of the market in the *1974 Fairness Report*.[213] In the following analysis, we will focus on the major participants in the information services marketplace: (a) over-the-air broadcasting, (b) substitute electronic technologies and (c) the print media.

(a) Broadcasting

94. The growth and development of radio broadcasting since the inception of the fairness doctrine has been dramatic. The total number of radio stations has increased by 280 percent since the *1949 Fairness Report*. Moreover, there has been a 48 percent increase in the number of radio stations since the Supreme Court's decision in *Red Lion* and a 30 percent increase since the Commission's *1974 Fairness Report*. During the period the most significant growth occurred in the FM service where there has been a 113 percent increase since *Red Lion* and a 60 percent increase since our *1974 Fairness Report*.

Number of Radio Stations

	1949	1969	1974	1985
AM	1877	4256	4407	4787
FM	687	2330	3094	4979
Total	2564	6595	7501	9766

Source: 1949, 1969, 1974 (on-air stations) data from *Television and Cable Factbook*, Cable and Services Volume No. 52 (1984): 1985 data from FCC release No. 5080, June 11, 1985.

[213] *See Red Lion Broadcasting Co. v. FCC*, *supra* n.10; *1974 Fairness Report*, *supra* n.3.

95. Of particular significance is the fact that the number of radio voices available in each local market has grown.[214] In this regard, we note that competition resulting from an increase in the number of radio outlets was the primary factor in our decision to deregulate the program guidelines, commercial limitations and formal ascertainment requirements for commercial radio.[215] Moreover, there has also been a fundamental change in the structure of the radio market. Once predominently an AM only service, radio is now composed of two very competitive services. For example, at the time of the *1974 Fairness Report* there were over a thousand more on-air AM stations than FM stations. Since that time, however, FM has eclipsed AM as the largest radio service. Because of its higher fidelity, the growth of FM constitutes a significant improvement in the quality of radio service to the public. The development of radio can also be seen in the diversity of its program distribution systems. At the present time, there are approximately 11 national radio networks and 90 regional radio networks.[216]

96. We also note that the number of radio outlets will continue to increase with the further development of spectrum efficient technologies. Recently, the Commission allocated 689 new FM channels and adopted new procedures to assist in the development of these allotments.[217] In addition, we have recently adopted new application procedures which are designed to streamline the processing of these new FM allotments as well as the existing 152 vacant FM allotments.[218] With respect to AM service, the Commission in 1980 acted in limit the protection from interface afforded Class I-A clear channel stations so as to increase spectrum availability for new AM radio services.[219] More recently,

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[214] Data submitted by NAB demonstrates that generally the growth of radio voices has generally occured throughout the various radio markets. *See* NAB Comments, *supra* n.79 App. Vol., App. A at 19-63. These data confirm the Commission's previous conclusions regarding overall growth in radio markets. *See Inquiry and Notice of Proposed Rule Making* in BC Docket No. 79-219, 73 FCC 2d 457, 548-551 (1979).

[215] *Report and Order* in BC Docket No. 79-219, 84 FCC 2d 968 (1981), *recon. denied*, 87 FCC 2d 797 (1981), *rev'd on other grounds sub nom. UCC v. FCC*, *supra* n.193 (hereinafter cited as "Radio Deregulation").

[216] *Broadcasting/Cablecasting Yearbook*, (1985) at F1-61.

[217] *See Report and Order* in Docket No. 80-90, 53 FCC 2d 1550 (1983); *First Report and Order* in MM Docket No. 84-231, 50 Fed. Reg. 3514 (January 25, 1985); *Second Report and Order* in MM Docket No. 84-231, FCC 85-124 (released April 12, 1985).

[218] *See Universal Filing Period, Public Notice*, FCC No. 4699 (May 22, 1985). *See also Report and Order* in MM Docket No. 84-750, FCC 85-125, 50 Fed. Reg. 19936 (May 13, 1985).

[219] *See Clear Channel Broadcasting in the AM Broadcast Band*, 78 FCC 2d 1345

the Commission in various proceedings has adopted policies making more efficient use of existing spectrum as well as enlarging that portion of the spectrum available for AM broadcast use.[220]

97. Equally significant has been the dynamic growth of over-the-air television broadcasting. The statistics presented below show the development of this medium.

Number of Television Stations

	1949	1969	1974	1985
VHF (Total)	51	577	605	654
Commercial	—	499	513	541
Educational	—	78	92	113
UHF (Total)	0	260	333	554
Commercial	0	163	184	369
Educational	0	97	149	185
Total	51	837	938	1208

Source: 1949, 1969 and 1974 (on-air stations) data from *Television Factbook*, Cable and Services Volume No. 52 (1984); 1985 data from FCC publication No. 5080 June 11, 1985.

98. As the above data demonstrate, there has been a 44.3 percent increase in the overall number of television stations since the Supreme Court's decision in *Red Lion Broadcasting*. This represents a 13.3 percent increase in VHF stations and a dramatic 113 percent increase in UHF stations. Television growth since the Commission's *1974 Fairness Report* has also been significant, amounting to a 28 percent increase in the overall number of television stations with 66.4 percent increase in UHF stations.

99. The continued growth in television broadcasting has led directly to an increase in signal availability in local markets.

(1980), *recon. denied*, 83 FCC 2d 216 (1980), *aff'd sub nom. Loyola University v. FCC*, 670 F.2d 1222 (D.C. Cir. 1982).

[220] *See, e.g., Report and Order* in MM Docket No. 84-281, FCC 85-224 (released May 7, 1985) (foreign nightime AM clear channels); *Report and Order* in MM Docket No. 84-752, FCC 85-150 (released April 24, 1985) (AM rules and international agreements); *Notice of Proposed Rule Making* in MM Docket No. 85-39, FCC 85-75 (released March 12, 1985) (AM application criteria); *Second Notice of Inquiry* in Gen. Docket No. 84-647, FCC 84-644 (released January 11, 1985) (preparation for ITV conference); *Report and Order* in BC Docket 82-538, FCC 83-412, 48 Fed. Reg. 42944 (September 30, 1983), *recon. denied in part*, FCC 84-591 (released December 4, 1984) (AM daytime operations).

Stations Receivable Per TV Household

Number of Stations Receivable

	1-4	5-6	7-8	9-10	11-14	15-19	20+
1984	4%	11%	21%	22%	24%	15%	3%
1972	17%	22%	30%	21%*	—	—	—
1964	41%	33%	18%	8%*	—	—	—

* 9+ stations

Source: *Nielson Report on Television*, 1985 at 2.

As of 1984, 96 percent of the television households received five or more televisions signals. This figure represents a significant increase in actual signal availability since 1972, where only 83 percent of the television households received five or more signals. The increase in even more dramatic compared to 1964 when only 59 percent of television households were capable of receiving 5 or more stations. Today, only 4 percent of the television households receive fewer than five signals. These statistics demonstrate a significant growth in signal availability throughout the country. Of particular significance is the fact that these figures are based on over-the-air reception and do not include the enhanced signal availability achievable with cable television. The significance of cable television as a factor in increasing the number of available signals will be discussed, *infra*. These data generally confirm statistics supplied by several commenters which demonstrate an increase in signal availability in both large and small markets.[221]

100. Increases in the number of outlets and signal availability does not necessarily provide a complete picture of the fundamental structural changes occurring in the television marketplace. For

[221] A study of signal availability submitted by NAB generally confirms this conclusion. NAB examined the growth of television signals in large markets (ADI 1-50), medium markets (ADI 50-100) and small markets (ADI 101+). Of particular interest is the increase in signal availability in small markets. Of the thirty-one small markets surveyed, seventeen had both an increase in signal availablilty since 1974 and a projected increase by 1990. Four markets showed an increase in signal availability since 1974 but had no projected increases. Ten markets exhibited no growth in signal availability between 1974 and 1984. However, seven of these markets anticipated increases in signal availability by 1990. Only three markets exhibited both no growth between 1974-1984 and no projected growth. However, one of these markets had four available signals and the remaining two markets had achieved significant cable penetration. *See* NAB Comments, *supra* n.79 App. Vol., App. A at 48-63.

example, UHF television, once thought to have occupied second class status, is now a significant voice in the marketplace.[222] Indeed, the growth of this service — 113 percent since *Red Lion* — is evidence of its economic viability. Concomitant with the growth in UHF stations has been the increased importance of independent television. As the Commission observed in its television deregulation decision, the growth of UHF independent television stations has added an important new voice in the information marketplace.[223] Since 1970, the number of independent television stations has grown from 90 to 214 stations, an increase of 107.7 percent.[224] Moreover, the growth in independent television stations has not been confined to a few large markets. As of 1984, independent stations were located in 98 different markets and reaching 82 percent of all television households.[225]

101. The impact of the rise of independent television stations can be seen in the steady decline of the network's audience share. As the Commission previously observed, the overall network audience share declined from 90 percent to 80 percent in 1983.[226] This trend continues as the overall network share dropped from 80 percent in 1983 to 76 percent in 1984.[227] In television households without cable television, the network share of the audience declined from 89 percent in 1983 to 85 percent in 1984. During this time period, non-network television usage in these housholds increased from 17 percent in 1983 to 21 percent in 1984. Moreover, non-network television stations were able to maintain their share of the television audience even in households subscribing to either pay cable or basic cable service.[228]

102. Further structural changes can be seen in the development

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[222] We note that while there always be physical differences between UHF and VHF services, these differences do not necessarily mean that UHF stations will not be a viable force in the television marketplace. *See Report and Order* in Gen. Docket No. 78-391, 90 FCC 2d 1121, 1124 (1982). Moreover, cable television has enhanced the ability to receive UHF stations thereby making it comparable to VHF television in markets that have been wired.

[223] *See Television Deregulation*, 98 FCC 2d at 1083 (1984).

[224] The growth in independent television stations has occurred primarily in the UHF television services. In 1970 there were 59 UHF independents compared to 155 in 1984. *Id.* at 1139 [1970 data]; Data of 1984 taken from *Broadcasting*, Jan. 7, 1985, at 82.

[225] *See Broadcasting*, Jan. 7, 1985, at 82.

[226] *Television Deregulation*, 98 FCC 2d at 1139.

[227] *Nielson Report on Television*, (1985) at 12.

[228] In households subscribing to pay cable services, the audience share of non-network stations increased from 16 percent in 1983 to 18 percent in 1984. During this same period the audience share of these stations remained stable — 20 percent — for homes subscribing only to basic cable service. *Id.*

of new program distribution systems among group owners.[229] We believe these alternative systems will not only provide new programming sources, but also enhance the economic viability of local independent television stations. Moreover, our recent modification to the natural multiple ownership rules is expected to foster the development of these new systems, thereby enhancing diversity at the local level.[230] In this regard, the development of these stronger voices may facilitate the ability of these stations to address controversial issues of public importance.[231]

103. We also note that additional grown can be achieved by utilizing vacant allocations and improved spectrum efficient technologies. Currently, there are a total of 54 vacant VHF channels and 462 vacant UHF channels.[232] Of these vacant allocations, 34 are commercial VHF channels and 109 commercial UHF channels. These vacancies appear in both large and small markets. For example, in the top 50 markets there are 32 commercial UHF vacancies. Moreover, 19 of these UHF vacancies are located within fifty-five miles of their respective titled ADI cities. There are also 20 noncommercial HF vacancies and 353 noncommercial UHF vacancies available nationwide. In addition, the Commision and others have conducted several studies demonstrating the technical feasibility of various UHF improvements, including enhanced reception, thereby reducing the impact of the traditional UHF "taboos".[233] Such improvements have the potential of increasing the number of UHF stations available in each market. These technological improvements combined with the number of vacant channels suggest that there is sufficiently available spectrum to anticipate continued growth in the number of television broadcast facilities.

104. Given the significant development of both radio and television, we believe it is no longer necessary to utilize a

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[229] For example, as of January 1985, Gannett Broadcasting Group, Hearst Broadcasting, Metromedia Inc., Storer Communications and Taft Broadcasting (prior to its merger with Gulf Broadcasting), representing 32 stations reaching 45 percent of television households had established a consortium to produce programmings. *See Broadcasting*, Jan. 7, 1985, at 86.

[230] *See Memorandum Opinion and Order*, 50 Fed. Reg. at 4670.

[231] We also note that the changes in the national multiple ownership rules will assist in the acquisition of those stations which were formerly devoted to subscription television. *Broadcasting*, Jan. 7, 1985, at 86 and 90.

[232] *Television Channel Utilization*, FCC No. 3723, Apr. 9, 1985.

[233] *See, e.g., Program to Improve Television Reception*, Georgia Institute of Technology, September 1980; J. B. O'Neill, *Television Receiver Noise Figure Study*, North Carolina State University, February 1980.; A. Stillwell, and R. Wilmotte, *Spectrum Requirements of UHF Television with Current and Improved Tuning*, FCC Office of Plans and Policy, 1978.

mechanism of government imposed "fairness" in order to insure appropriate coverage of controversial issues of public importance. As the above data amply demonstrate, there are a sufficient number of over-the-air television and radio voices to insure the presentation of diverse opinions on issues of public importance.[234] Our decision in this proceeding is guided to some extent by the underlying policies expressed in the radio and television deregulation proceedings.[235] In both decisions, the Commission found that the growth of the broadcast medium created sufficient economic incentives to attenuate the need for each licensee to provide "well balanced something for everyone programming." Similarly, we believe that the growth in both radio and television broadcasting provide reasonable assurance that a sufficient diversity of opinion on controversial issues of public importance will be provided in each broadcast market. In this regard, we note that even if there has been no increase in alternate electronic information sources, the growth and development of both the radio and television markets by themselves make the fairness doctrine an unnecessary regulatory mechanism.

(b) Substitute Electronic Technologies

105. In addition to traditional over-the-air television and radio broadcasting, we find that there exist numerous alternative electronic technologies making a significant contribution to the marketplace of ideas. The importance of these technologies, especially cable television, in the policy making context was recently recognized by the United States Circuit Court of Appeals.[236] We believe that in the context of this proceeding consideration should be given to the contributions of cable television, low power television (LPTV) multichannel multipoint distribution service (MMDS), video cassette recorder (VCR), satellite master antenna systems (SMATV) and other electronic media including recent advancements in satellite technology.

106. Universally recognized as a significant non-over-the-air

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[234] This diversity is illustrated further by the combined coverage of both television and radio signals. For example, in a separate proceeding CBS claims that its television station in New York City emcompasses 196 radio stations within it Grand B Contour. Moreover, CBS asserts that its New York television station must compete with 278 radio stations which provide service to some portion of the area covered by its Grade B contour. *See* "CBS Reply Comments" filed with *In re Application of Turner Broadcasting System, Inc.*, File No. BTCCT-850418 *et al*, June 1985 at 60.

[235] *See Radio Deregulation*, supra n.215; *Television Deregulation*, *supra* n.177.

[236] *ACT v. FCC*, 756 F.2d at 901.

electronic medium, cable television has developed from a means of improving reception into a major industry providing video programming. Early data show that in 1952, three years after the *1949 Fairness Report*, there were 70 operating cable systems with an estimated 14,000 subscribers.[237] At the time of the Supreme Court's decision in *Red Lion* there were 2,260 systems in operation with an estimated 3.6 million subscribers.[238] By the time of our *1974 Fairness Report*, there were 3,158 operating cable systems with a reported 8.7 million subscribers.[239] As of 1985 there are 6,600 operating cable systems in 18,500 communities with approximately 1,600 franchises that have been approved but not built.[240] According to recent A. C. Neilson estimates, U.S.cable households now number 38,673,270 placing national cable penetration at 43.3% of all television households.[241] In comparative terms, the number of cable systems in operation has increased 195 percent since *Red Lion* and 111 percent since the Commission's *1974 Fairness Report*. Growth in subscribership amounts to an astronomical 975 percent since the *Red Lion* decision and 345 percent increase since the *1974 Fairness Report*. Moreover, cable television will continue to expand in the future. According to a recent study by Arthur D. Little Inc., the number of cable subscribers will increase to 48 million by 1990.[242] In addition, industry revenue is expected to double from 8.4 billion in 1984 to 16.5 billion in 1990. During this period after tax revenues are expected to triple from $600 million in 1984 to 1.7 billion in 1990.[243]

107. The importance of cable's development, however, is not limited to increases in the number of systems. Indeed, there has been a significant change in the nature of cable service. For example, at the time of the *Red Lion* decision only 1 percent of all cable systems had the capacity to carry more than 12 channels.[244] As of April 1, 1984, 58 percent of the cable systems exceed 12

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[237] *Television and Cable Factbook*, Cable & Services Volume No. 52 (1984) at 1735.
[238] *Id.*
[239] *Id.*
[240] *Broadcasting/Cablecasting Yearbook*, (1985) at D-3.
[241] *Broadcasting*, June 17, 1985 at 10.
[242] *Prosperity for Cable TV: Outlook 1985-1990*, Arthur D. Little Inc., *cited in Broadcasting*, June 10, 1985 at 32. This may be a conservative estimate. As we have noted elsewhere, some analysts expect cable penetration to be 60 percent by 1990, reaching 58 million subscribers. *See Television Deregulation*, 98 FCC 2d at 1138. Another source has estimated that cable penetration will reach 54 percent by 1990. *Cablefile*, (1985) at III-26.
[243] *Id.*
[244] *Notice, supra* n.1 at 37 n.47 *citing* B. M. Compaine, C. H. Sterling, T. Guback and J. K. Noble, Jr., *Who Owns the Media* (2nd ed. 1982) at 418.

channels. Most importantly, however, systems limited to 12 channels or less compr[illegible] only 18.63 percent of total cable subscribers.[245] The significance of cable television is also demonstrated by its ability to increase the number of viewing options available to the public. The following table illustrates the importance of cable by comparing the number of stations receivable per television household to the number of channels receivable with cable television.

Stations and Channels Receivable
Per TV Household in 1984

	1-4	5-6	7-8	9-10	11-14	15-19	20+
Number of Channels Receivable (includes cable)	3%	5%	9%	9%	29%	16%	29%
Number of Stations Receivable (absent cable)	4%	11%	21%	22%	24%	15%	3%

Source: Nielson Report on Television, (1985) at 2.

With the inclusion of cable telvision, the number of households capable of receiving more than six television signals increases from 85 percent of all television housholds to 92 percent of all television households. Similarly, the percentage of television households capable of receiving more than ten television signals increases from 42 percent to 74 percent. The most dramatic increase in signal availability appears in households receiving 20 or more signals. Absent cable, these households comprise only 3 percent of all television households as compared with 29 percent of all television households when cable is considered. The importance of increased channel capacity is enhanced by the ready availability of a wide variety of cable networks which provide a significant array of diverse programming. As one commenter has noted, there are approximately twenty-eight basic cable networks

[245] *Television and Cable Factbook*, Cable & Service, Volume No. 52, 1984 at 1726.

not including four super stations.[246] Many of these networks have highly specialized program formats including news channels such as the Cable News Network, the Financial News Network, and public affairs programming such as C-Span.[247] In addition, there are approximately 10 pay cable networks in operation.

108. Apart from the growth in the number of cable systems, we find that the pattern of development in small markets to be particularly relevant to the objectives of this proceeding. The record in this proceeding clearly demonstrates that cable services are in important media voice in small markets. Cable penetration rates in these markets are far in excess of the national average and significantly higher when compared with larger broadcast markets.[248] The high penetration levels in these small markets suggest that there is a significant degree of substitutability between cable and over-the-air television broadcasting.

109. We also note that the Cable Communications Policy Act of 1984 will play an important role in expediting further development of cable technology.[249] Congress intended to establish a national policy that encourages the growth and development of cable television as well as insuring that cable systems are responsive to the needs and interests of the local communities they serve.[250] Under the Act, a franchising authority is able to establish and designate channels for public, educational or government (PEG) use as well as commercial access channels for systems with 36 or more activated channels.[251]

110. Another developing voice in the information services market is Low Power Television (LPTV). These stations are over-the-air television broadcast facilities, generally limited to 10 watts for VHF and 1,000 watts for UFH stations. These facilities were nonexistent at the time of the *Red Lion* decision and our

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[246] *See* NAB Comments, *supra* n.79 App. Vol., App. A at 4.

[247] Additional growth in cable networks can be expected. For example, the Discovery Channel recently commenced operation offering a basic cable service of educational, non-fiction, science and nature programming free to cable operators. *Multichannel News*, June 24, 1985 at 1.

[248] For example, an analysis of NAB's data concerning 31 of the smallest television markets (100+) reveals a combined average subscription rate of approximately 57 percent, almost fourteen percentage points higher than the national average. *See* NAB Comments, *supra* n.79 App. Vol., App. A.

[249] Cable Communications Policy Act of 1984, Pub. L.No. 98-549, 98 Stat. 2779 (1984).

[250] *See* House Committee on Energy and Commerce, H.R. Rep. No. 931, 98th Cong. 2d Sess. at 19 (1984); *See also Report and Order* in MM Docket No. 84-1296, FCC 85-179 (released Apr. 19, 1985) at 28-37.

[251] *Id.* at 30.

1974 Fairness Report. Stations of this power were translators, limited to the rebroadcast of signals from full service stations. In 1982, the Commission authorized these stations to originate programming.[252] There are currently 126 licensed low power UHF stations and 215 low power VHF stations.[253] It is predicted that this source will eventually add an additional 4000 television stations to the marketplace. Moreover, the most significant administrative problems inhibiting initial development of this new service have been rectified with the establishment of new processing procedures designed to expedite the development of this medium.[254]

111. LPTV significantly expands the information marketplace. Allocation policies have emphasized placing these facilities in smaller markets were there are fewer over-the-air full service television facilities. With lower entry and operating costs, LPTV can be an important source of local programming in rural areas. In larger markets, LPTV will be able to target its audience to specific communities or ethnic groups.[255] A recent economic study provides some evidence that this service appears to be commercially viable in certain areas of the country.[256]

112. At the time of the *1974 Fairness Report*, multipoint distribution service (MDS) was just beginning to develop as a communications service. Used primarily to provide subscription programming via microwave transmissions, there were approximately 438,578 MDS subscribers out of a potential audience of 13.1 million at the end of 1984.[257] Confined to offering a single pay channel, MDS subscription declined slightly from 1983 levels.

113. Expectation of growth in MDS will likely involve the development of multichannel MDS systems. With the reallocation of 8 channels from Instructional Fixed Television Service, multichannel MDS will be able to offer multiple channels as

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[252] *See Report and Order*, in BC Docket No. 78-253, FCC 82-107, 47 Fed. Reg. 21468 (1982).

[253] FCC release No. 5080, June 11, 1985.

[254] *See Report and Order* in MM Docket No. 83-1350, FCC 84-492 (adopted October 18, 1984).

[255] *Legal Times*, Dec. 8, 1984, at 1; *Wall Street Journal*, Oct. 23, 1984, at 1.

[256] The study, conducted by Kompas Beil Associates, indicates that LPTV may already be a viable service in some areas. Of the stations initially responding to its survey, 16 stations were non-profit religious stations, 8 were operating as subscription television, 10 were operating as non-profit educational stations. Sixteen stations were operating on a commercial basis with fourteen of these stations reporting a profit. Two of the stations were temporarily off the air with copyright problems. *Videography*, Apr. 1985 at 72.

[257] Paul Kagen Associates, Inc., *Multicast Newsletter*, Apr. 17, 1985.

opposed to a single viewing option.[258] Added to this are leases available from ITFS operators leading to MMDS systems of up to twenty two channels. As of February 1985, there were 16,499 applications on file with the Commission.[259] The advantage of this service is that construction costs and time delays are greatly reduced, relative to cable, since wiring to a headend is not necessary. Estimates of subscribership growth by 1990 range between 6 to 12 million subscribers.[260]

114. Satellite Master Antenna Systems (SMATV) are similar to cable systems except that they are built in individual apartment complexes, condominiums, hotels and trailer parks. These "private" cable systems did not exist at the time of the *Red Lion* decision or our *1974 Fairness Report*. The Commission's decision not to regulate these systems, coupled with preemption of state and local regulation, has facilitated the development of this service.[261] According to the National Satellite Cable Association about 600,000 to 800,000 homes have been wired with this service.[262] Because of lower capital and construction costs, SMATV systems have become increasingly popular in both rural and urban areas that are currently unserved by cable television.[263]

115. Sales of video cassette recorders continue to have a major impact on the information marketplace. As with many other new technologies, VCR's were not readily available at the time of the *1974 Fairness Report*. The impact of this technology on other electronic video technologies has been significant. By the end of 1985 it is estimated that there will be 23.3 million VCR homes representing 27.4 percent of all TV households.[264] A more recent study of VCR penetration reported that sales are running about one million a month and will reach critical mass penetration of one third of all homes by early 1986. According to the report the term "critical mass" is used to describe the penetration level that

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[258] *See Report and Order* in Gen. Docket 80-112, 94 FCC 2d 1203 (1983).

[259] *Broadcasting*, Feb. 11, 1985, at 56.

[260] *Television Deregulation*, 98 FCC 2d at 1140.

[261] *See Memorandum, Opinion Declaratory Ruling and Order* in in CSR 2347, 95 FCC 2d 1223 (1983), *recon. denied*, FCC 84 206 (May 14, 1984), *affd. sub nom. New York State Commission on Cable Television v. FCC*, 749 F.2d 805 (D.C. Cir. 1984).

[262] *New York Times*, Dec. 5, 1984, at 30. A more conservative estimate was provided by Paul Kagen Associates who estimated subscribership at 230,000. Paul Kagen Associates, *SMATV News*, Apr. 25, 1984.

[263] *New York Times*, Nov. 13, 1983, at 47; *See also New York Times*, Dec. 19, 1982, at 1.

[264] *Television/Radio Age*, May 27, 1985, at c7 (*citing* Paul Kagen Associates).

establishes the technology as a mass medium.[265] Further estimates place VCR usage at 67.9 million homes representing 68 percent of all television households by 1990.[266]

116. We take particular note of the development of video recordings as a means of disseminating issue related video programming.[267] We find this to be a significant development in the information marketplace. To the extent VCR's do not utilize spectrum, anyone who desires to communicate by television may do so by means of a VCR. In this regard, we agree with NBC that VCR's have the potential to become the "electronic handbills" or indeed even the electronic newspaper of the future.[268] Moreover, our own empirical analysis of the relationship between VCR's and television reveals that a VCR is both a substitute and a complement to over-the-air and cable television.[269] In other words, VCR's act not only as a means of time shifting programming, but also as an independent source of programming. Moreover, the ability to reschedule video programming gives viewers the opportunity to acquire additional information from other sources. By time shifting, viewers are able to reallocate their time so as to increase the number of potential viewing options.[270] We believe that the flexibility afforded the public by VCR's, represents an important qualitative development in the information services marketplace.

117. The above mentioned electronic technologies are the most prominent alternatives to over-the-air broadcasting in today's marketplace. There are other electronic services, however, that have the potential of becoming substitute information sources in the marketplace of ideas. We do not, however, find them to be significant contributors to the marketplace at this time.

118. The direct to home satellite services (DBS) is still in the beginning stages of development. Using the Ku satellite band,

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[265] *Broadcasting*, July 8, 1985, at 14 (*citing* a study conducted by Young & Rubicam USA).

[266] *Id.*

[267] *UCC* notes in its Comments that there are currently 72 titles considered public affair by the publishers. Similar categories such as "Civil Rights" (54 titles) and "Documentaries" are also included. *See* UCC Comments, *supra* n.170 at 3.

[268] *See* NBC Comments, *supra* n.86 at 88.

[269] J. Levy and P. Pitsch, *Statisical Evidence of Substitutability Among Video Delivery Systems*, FCC Office of Plans and Policy, April 1984. *See also* J. Levy and F. Setzer, *Measurement of Concentration in Home Video Markets*, FCC Office of Plans and Policy, December 23, 1982.

[270] According to Neilson data, 59 percent of all recordings are made with the television set turned off, 17 percent occurs while viewers are watching a different channel and 24 percent of viewers record from the channel they are watching. *Neilson Report on Television*, (1985) at 13.

this service generally provides programming directly to households. Households using this service either rent or purchase a small one meter-earth station. The first direct broadcast satellite services was authorized by the Commission in 1982.[271] Of the eight original applicants, three have been granted orbital and channel assignments and launch authority. In 1984, the Commission granted six additional applications for DBS service.[272] One of these grantees has been given launch authority as well as its orbital and channel assignment. Currently, the Commission has pending before it six DBS applications seeking either to modify existing grants or apply for new allocations.[273] It appears, therefore that despite the recent setbacks, there is a continued interest in the development of DBS service.[274]

119. Another important element prompting the development of satellite direct service is the continued growth in the home earth station market. Latest reported data indicate that there are approximately one million existing earth stations and estimates of growth range between 40,000 to 80,000 per month.[275] Moreover, the Cable Communications Policy Act of 1984, which clarified the legality of receiving satellite signals, may provide an additional spur to this already expanding market.[276] Because of the poten-

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[271] *See Direct Broadcast Satellite Services*, 90 FCC 2d 676 (1982) *recon. denied*, FCC 83-241, (released May 19, 1983), *rev'd, United States Satellite Broadcasting Company, Inc. v. FCC*, 740 F.2d 1177 (D.C. Cir. 1984); *Satellite Television Corporation*, 91 FCC 2d 953 (1982); *CBS, Inc.*, 92 FCC 2d 64 (1982). *See also GTE Satellite Corporation*, 90 FCC 2d 1009 (1982) *recon. denied*, FCC 83-271 (released June 23, 1983). Of the eight original grantees, four were able to demonstrate due diligence in proceeding with the development of their respective DBS systems. *See CBS, Inc.*, FCC 84-477 (released October 10, 1984). Two of the parties failing to meet the due diligence requirements have re-applied to the Commission for DBS authorization.

[272] *See Satellite Syndicated Systems Inc.*, FCC 84-608 (released December 16, 1984).

[273] *See Public Notice* "DBS Applications Accepted for Filing" Rep. No. DBS 2-B (released April 4, 1985). Three of these applicants are existing grantees seeking additional channels. Two of the three applicants seeking new DBS authorization were previously granted such authority but failed previously to meet the Commission's due diligence requirements.

[274] Earlier this year, U.S.C.I. terminated service to its approximately 10,000 subscribers. *DBS Newsletter*, April 1985 at 1. This DBS service was not a Commission licensee but rather utilized Canada's Telesat Anik C-II satellite. While this system did not prove to be a commercial success, it did demonstrate the technical feasibility of Ku band direct satellite service. *See Broadcasting*, July 8, 1985 at 52.

[275] *See Broadcasting*, July 8, 1985, at 52.

[276] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, §5(b), 98 Stat. 2779 (1984). This section amended section 705 of the Communications Act by allowing the reception of any satellite cable programming for private viewing

tially enormous market, some traditional cable programmers have suggested scrambling their signals to provide a direct to home satellite service from their C band satellites.[277] Facilitating the development of this system is the oversupply of transponders which will lower the costs of transmission making this form of program particularly attractive.[278] While the development of a C-band direct system is still in the planning stage, there appears to be significant movement towards developing this service.[279]

120. Satellite technology has also played a significant role in enhancing existing information services. For example, satellites have allowed local television stations to increase their capability to gather news. Satellite news gathering (SNG) has become an important element in providing regional coverage.[280] In addition, satellite technology has become an important part of the syndication market.[281] The nationwide access afforded by this technology increases the opportunities for another source of programming through ad-hoc networking, thereby increasing viewpoint diversity in local markets.

121. An additional alternative technology is subscription television (STV). STV is a pay service that sends over-the-air television signals, in a scrambled mode, to its subscribers. The number of STV outlets has declined in recent years due primarily to increased cable penetration. As of June 30, 1984 there were approximately 701,042 STV subscribers and 19 STV channels operating in 17 markets.

122. Additional information technologies are continuing to be developed. The Commission has recently authorized the use of FM Radio subcarriers.[282] Subcarriers may be utilized for a variety of different functions such as "radio talking books", commodities information, stock quotes and news. The Commission has also

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if: (1) the programming involved is not encrypted and, (2) a marketing system has not been established.

[277] Descramblers for the reception of HBO, which scrambles part of its programming, are already being manufactured. Approximately 25,000 headend descramblers have been produced and parts have been ordered for 100,000 consumer units which will be distributed to wholesalers next fall. *See Broadcasting*, July 8, 1985, at 83.

[278] *Id.* at 46.

[279] *See Broadcasting*, July 1, 1985, at 87; *Broadcasting* July 8, 1985, at 52.

[280] *See Broadcasting*, July 8, 1985, at 60.

[281] *Id.* at 58. In this regard, we note that continued development of satellite technologies will facilitate the development of new program distribution systems. *See* ¶ 102, *supra*.

[282] *Report and Order* in BC Docket No. 82-536, FCC No. 83-1154, 48 Fed. Reg. 28445 (June 22, 1983); *Second Report and Order* in BC Docket No. 82-536, 97 FCC 2d 23 (1984), *recon. denied*, FCC 84-313, 98 FCC 2d 433 (1984).

authorized the use of teletext by television licensees.[283] This system uses the vertical blanking interval for transmitting pages of text which are formatted on the users screen with the use of a decoder. Videotext is also a potential source of information. At the present time, this service has approximately 500,000 subscribers.[284] As a final matter home computer systems have played a significant role in adding to the information services marketplace. However, we do not find these services to be significant contributors to media diversity at this time.

(c) Print Media

123. As we observed in the *Notice* the overall number of broadcast facilities exceeds the total number of daily newspapers in the United States. This does not mean, however, that the print media is not a significant contributor to the information marketplace. As of 1984, there were 1,701 daily newspapers in the country.[285] During this period, average circulation increased to 62,544,503, an increase of 157,426 from 1983 levels.

124. In analyzing the information marketplace, however, we agree with those commenters who felt that the *Notice* gave insufficient consideration to the importance of other print sources such as weekly and even monthly newspapers and magazines. According to the *Notice*, the total number of periodicals has increased from 6,960 in 1950 to 10,688 in 1982. As commenters such as MAP and UCC point out, these newspapers are significant source of information, especially local information, which is available to consumers in each market.[286] The viability of newspapers as an important information source is further illustrated by the volume of advertising appearing in each medium. According to this criterion, advertising expenditures for newspapers exceeded both television and radio.[287] Moreover, the co

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[283] *Report and Order* in MM Docket No. 81-741, 48 Fed. Reg. 27054 (June 13, 1983).

[284] *Broadcasting*, July 1, 1985, at 64.

[285] *Editor and Publisher Yearbook*, (1984) at VIII. The figures are based on 1983 data and represent a decline of 10 newspapers when compared with 1982 figures. However, this decline was due to the merger of 10 daily papers and therefore, does not evidence a net decrease in the number of daily newspapers. During this period, 8 daily newspapers were discontinued but this was offset by new entries into the market. *Id.* at V.

[286] *See* MAP/TRAC Comments, *supra* n.50 at 86-90; UCC Comments, *supra* n.170 at 13.

[287] In 1983, the total advertising volume for the various media was approximately $20.1 million for newspapers, $16 million for television, $5.2 million for radio

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bined advertising revenues for newspapers and magazines were greater than the combined total for television and radio. We believe that these data provide important evidence relative to the strength of newspapers and magazines as significant contributors to the marketplace of ideas.

3. Availability in the Information Market

125. Several parties have argued that the increases in the number of information outlets do not necessarily attenuate the need for the fairness doctrine.[288] Specifically, these parties state that overall increases in information service outlets are not necessarily sufficient to provide each market with diverse and antagonistic sources of information. The argument is predicted on two assumptions. First it assumes that the growth of information sources nationwide has had no impact on local markets. Second it assumes that these sources will not provide coverage to controversial issues of public importance. As noted below, we find the data upon which these assertions are based, flawed, and we are not persuaded by the logic of the arguments.

126. On the record before us, we find that the nationwide development of these diverse information sources has had a direct impact on the availability of information in each media market. For example, even in small markets such as El Paso, Texas (ADI market No. 104), there are a significant number of media vioces. According to data submitted by NAB, this market has seven television stations, twenty seven radio stations, two MDS channels, thirty thousand VCR's and cable penetration at 47 percent.[289] The most detailed refutation of this position appeared in a study conducted by Prof. Ralph Jennings.[290] The study sampled ten percent of the 3,926 communities in the United States which have at least one commercial or public radio station. It then inventoried each community's broadcast, newspaper, cable and multipoint distribution system and "examined the extent to which the communities share in the national communications wealth."

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and 4.1 million for magazines. *Television and Cable Factbook*, Services Volume No. 52 (1984) at 14.

[288] *See, e.g.*, "Comments of Black Citizens for a Fair Media, Citizens Communication Center, League of United Latin American Citizens, National Association of Better Broadcasting [hereinafter cited as "BCFM Comments"]; UCC Comments, *supra* n.170.

[289] NAB Comments, *supra* n.79 App. vol., App. A. at 49.

[290] R. Jennings, *Diversity of Communications Facilities in American Communities, cited* in UCC Comments, *supra* n.10 at App. B, and USCC Reply Comments, *supra* n.152 [hereinafter cited as "Jennings Study"].

We have carefully reviewed the data contained in the study and disagree with the methodology employed therein. At the outset, the study does not appear to provide a representative sampling of media markets throughout the United States. Rather, the study focuses primarily on small markets. Recognizing this problem, the study attempts to enlarge its sample by including 72 larger communities. However, the study itself recognizes that even with these communities the sample does not reflect the characteristics of the population as a whole.[291]

127. A second concern involves use of the "community" as the basic unit of analysis. The study assumes that a community is not being served unless a broadcast facility (or other information source) is located within the geographic boundaries of the community. As CBS correctly points out, the relevant inquiry is not what stations are licensed to a community, but rather what broadcast signals the community can actually receive.[292] In this regard, we note that the Commission has recognized that a broadcast licensee may serve communities which lie outside the strict geographic boundaries of its community of license.[293] Moreover, such methodology may underestimate the availability of broadcast facilities and other information services such as cable and local newspapers.[294]

128. On the record before us, we cannot find that there are a insufficient number of voices in local markets to warrant continuation of the fairness doctrine. As we observed previously, increases in signal availability for traditional broadcasting facilities — television and radio — by themselves attenuate the need for a government imposed obligation to provide coverage to controversial issues. The existence of a plethora of alternate

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[291] *Id.* at 10.

[292] "Reply Comments of CBS, Inc." at 22 [hereinafter cited as "CBS Reply Comments"].

[293] *See, e.g., Report and Order* in B.C. Docket No. 82-374, FCC 83-487, 54 RR 2d 1343 (1983), *recon. denied*, 56 RR 2d 797 (1984); *Report and Order* in B.C. Docket No. 82-320, 93 FCC 2d 436 (1983), *recon. denied*, FCC 84-335 (released July 31, 1984).

[294] The following example illustrates the potential problems inherent in the study's analysis. The study reports the following cities as not having cable television service in their community: Birch Tree, Missouri and Marshall, North Carolina. However, each of these towns is served by a cable system in which the corporate headquarters of the cable system is located outside of the community. *See Television and Cable Factbook*, Services Volume No. 52 (1984) at 997 and 1151. Similar concerns exist with respect to local newspapers. For example, the study reports that the town of Weston, Massachusetts did not have a local newspaper. However, the town is served by a weekly newspaper that covers local issues, but it is published in a neighboring town. *See Wayland/Weston Town Crier* (Weston Edition), July 3, 1985 at 1.

electronic voices, as well as numerous locally oriented print voices, augments this argument. Further support for this conclusion can be found from the homogeneity of the various media systems. Thus, in communities with few television stations one can expect to find higher cable subscribership. For example, the Jennings study found that cable was available in 82 percent of the communities surveyed. Similarily, in large urban areas with no cable systems, there are generally numerous television outlets. Moreover, data submitted by NAB confirms fungibility of the various information service technologies.[295]

129. Several commenters have argued that absent the fairness doctrine there will be no incentive for broadcasters to provide coverage to controversial issues of public importance. These parties also assert that the new electronic technologies are unable to address these types of issues, particularly at the local level. We are not persuaded by these arguments.

130. We note that other information systems, such as the print media, devote a significant amount of time to controversial issues in the absence of a government imposed obligation to do so. For these media, the incentive to cover such issues is not the fear of government sanction, but rather economic necessity. Similar incentives exist for over-the-air broadcasting. Our experience with industry performance persuades us that radio and television broadcasters would be sufficiently motivated to provide coverage to controversial issues of public importance in the absence of fairness doctrine obligations. Indeed, assuming *arguendo* that television is the most relied upon information source, then there is a strong market incentive to cover such issues in response to the demand.[296] As we have observed in other proceedings, marketplace forces are the primary determinants of information oriented programming.[297] Moreover, given our previous analysis regarding the chilling effect of the fairness doctrine, we believe it reasonable

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[295] *See* NAB Comments, *supra* n.79 App. Vol., App. A at 48-63.

[296] Evidence of a marketplace demand for programming covering controversial issues of public importance can be seen in the employment patterns of news staffs after our television and radio deregulation decisions. A recent study of the effects of deregulation conducted by RTNDA found that: "[M]ost radio stations have not changed their news or public affairs staffing or programming as a result of deregulation. Most TV stations also plan to continue business as usual. News cutbacks have come mainly at radio stations in major markets where changes have drawn attention and accusations against deregulation. But while some news directors may have lost staff members because the FCC lifted its minimum requirements, other [sic] say they are doing a better job because of the greater freedom." *RTNDA Communicator*, May 1985 at 1.

[297] *See generally*, *Deregulation of Television*, *supra* n.177; *Deregulation of Radio*, *supra* n.215.

to expect an increase in the coverage of these types of issues. In any event, there is no reason to believe that there will be a decline in the coverage of controversial issues of public importance.

131. Apart from the incentives of traditional broadcast facilities, we believe that other media systems will provide sufficient amounts of programming covering controversial issues of public importance. Cable television, for example, is already providing various informational programming such as CNN and the Financial News Network. Moreover, many cable systems are originating their own programming and have local community access channels. Increased availability of VCR's will also provide an important outlet for discussion of issues in each market. Most importantly, local newspapers will remain as an important source of locally oriented information.[298] All of these sources will make significant contributions to the marketplace of ideas.

H. The Fairness Doctrine Can Not Be Justified on the Basis that It Protects Either Broadcasters or the Public from Undue Influence.

132. As noted above,[299] the Commission historically justified the retention of the fairness doctrine on the sole basis that affirmative regulatory intervention was necessary to vindicate the interest of the public in obtaining access to diverse viewpoints on controversial issues of public importance. Our evaluation of the fairness doctrine both in terms of its efficacy and its continued need in the communications marketplace today is based upon this expressed regulatory objective. Several participants in this proceeding, however, have argued that the retention of the doctrine furthers other regulatory goals. Specifically, these parties argue that there are legitimate "protective" functions which are promoted by the continued existence of the doctrine. In this section we will assess the merits of these arguments.

133. Several commenters contend that retention of the fairness doctrine is useful as a "protection against outside pressures"[300] by groups within the community which would otherwise exert

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[298] In light of our conclusion that sufficient incentives exist to provide coverage to controversial issues among the traditional broadcast media, reliance on alternate electronic technology systems to provide coverage to such issues is not a necessary element in our decision. We note, however, that these information sources are significant contributors of issue oriented information. In this regard, their performance makes the elimination of the fairness doctrine even more compelling.

[299] *See* ¶¶ 4, 23, *supra.*

[300] "Comments of the United States Catholic Conference" at 19 [hereinafter cited as "USCC Comments"].

undue influence on the editorial decisionmaking of broadcasters. Absent the fairness doctrine, these parties contend that broadcasters will simply "cave-in" to the pressures of advertisers,[301] political action committees,[302] or other powerful groups in the community[303] who do not wish to have particular controversial viewpoints expressed.[304]

134. We take issue with the assumption that intrusive governmental regulation is necessary to "protect" broadcasters from groups which allegedly attempt to influence their programming decisions. The First Amendment forbids governmental intervention in order to "protect" print journalists and we believe that broadcast journalists are in no greater need of "protection" than their counterparts in the print media. We think it telling, in this regard, that broadcasters themselves are not seeking this protection. Moreover, the framework of broadcast regulation is predicated in large part upon reliance on the editorial discretion of

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[301] *See, e.g., id*; DNC Comments, *supra* n.203 at 17; *See also* USCC Reply Comments, *supra* n.152 at 9.

Indeed, without providing any support for its assertion, the Democratic National Committee ("DNC") argues that "the potential fear [of broadcasters] of offending a power group in the community that buys advertisements was the reason the Fairness Doctrine was adopted in the first place." *Id.* at 17. As described above, the articulated reason for the establishment of the fairness doctrine was to further access by the public to diverse viewpoints on controversial issues of public importance. Our historic justification of this doctrine was not based upon an expressed concern that regulatory intervention was necessary to counterbalance the alleged influence exerted by advertisers—or any other group—on licensees with respect to their decisions concerning the broadcast of controversial issue programming.

[302] DNC Comments, *supra* n.203 at 15-16.

[303] The most expansive articulation of this argument was expressed by Ecumedia. In its Reply Comments, it stated that the fairness doctrine provided broadcast journalists with the means to deflect pressure exerted by "external sources including politicians, public officials, corporations, advertisers, organized community groups and outspoken individuals [as well as] [i]nternal pressure from station management or parent companies. "Reply Comments of Ecumedia," at 19. [hereinafter cited as "Ecumedia Reply Comments"].

[304] For example, asserting that the fairness doctrine operates as an effective "insulating" mechanism, DNC argues that:

> The Fairness Doctrine actually protects a broadcaster who does not want to take this safe course of cozy relations with its community's financial elite . . . .
>
> Many broadcasters go to great lengths to present issues of public importance and offer their audiences balanced coverage. For them, the Fairness Doctrine has been a valuable shield. When pressured by demands from established powers in its community to suppress coverage of an unpopular issue or to support their political points of view, a broadcaster today can simply point to his or her responsibilities under the Doctrine.

DNC Comments, *supra* n.203 at 18.

broadcast journalists. As the Supreme Court has stated, the Communications Act "manifest[s] the intention of Congress to maintain a substantial measure of journalistic independence for the broadcast licensee."[305] Consequently, consistent with their public interest responsibilities, broadcasters are accorded wide discretion under the Communications Act with respect to their programming decisions.[306] We are not convinced that broadcasters have been unduly pressured by groups within the community in the past. Moreover, in our view, the speculative notion that, absent the fairness doctrine, they will be unable to resist undue pressure in the future is a wholly inadequate basis upon which to justify the continued existence of rules which intervene in the editorial decisionmaking process of broadcast journalists. Rather, we deem it appropriate to rely, as we have in the past, upon the good faith judgment of the licensee regarding the selection of programming material.[307]

135. In addition, several commenters, in support of the fairness doctrine, argue that the doctrine serves to safeguard the public against unwarranted influence by what they perceive as biased broadcast reporting.[308] Although the commenting parties differ among themselves in their perception of the bias to which they object,[309] they believe that retention of the fairness doctrine is

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[305] *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 116. Indeed, the Supreme Court, in addressing the editorial discretion of broadcast journalists under the Communications Act, has recognized that "[f]or better or worse, editing is what editors are for; and editing is selection and choice of material." *Id.* at 124.

[306] The Court has asserted that:

> In the delicate balancing historically followed in the regulation of broadcasting Congress and the Commission could appropriately conclude that the allocation of journalistic priorities should be concentrated in the licensee rather than diffused among many. This policy gives the public some assurance that the broadcaster will be answerable if he fails to meet its legitimate needs.

Id. at 125.

[307] Reliance upon the editorial discretion of broadcast licensees also furthers First Amendment principles. As the United States Supreme Court has stated:

> Indeed, if the public's interest in receiving a balanced presentation of views is to be fully served, we must *necessarily* rely in large part upon the editorial initiative and judgment of the broadcasters who bear the public trust.

FCC v. League of Women Voters of California, 104 S.Ct. at 3117 (emphasis added).

[308] *See, e.g.*, "Comments of the American Legal Foundation" at 10-14 [hereinafter cited as "ALF Comments"].

[309] There appears to be a sharp divergence of opinion among the commenters making this argument as to the precise nature of the alleged "bias." For example, one party asserts that the bias of the broadcast media is liberal (*Id.* at

appropriate to prevent broadcasters from presenting biased or one-sided programming. The argument apparently is predicated upon the presumption that the requirement to provide "balanced" controversial issue programming is not merely a means to assure access to the marketplace of ideas but is itself a valid regulatory objective.

136. Balance may be a laudable editorial goal, but there are grave dangers when the government tries to strike that balance. First, as we have just noted above, determining what constitutes balanced programming is a very subjective endeavor. Second, as we have described, having the government attempt to achieve balance by means of enforcing the fairness doctrine results in a chilling effect to the ultimate detriment of the listening public. Third, there are the inherent dangers of an arm of the federal government influencing the content of programming in an attempt to guarantee balance. Further, the First Amendment does not require and may well not permit a neat apportionment, dictated by the government, in the marketplace of ideas, with equal space assigned to every viewpoint. As the Supreme Court noted in *First National Bank v. Bellotti*:

> [T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people can not evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment.[310]

The fact that a particular viewpoint may have the capability to be extremely influential or offensive does not mean that it is accorded a lesser degree of First Amendment protection than the expression of less influential or more reasonable opinions.[311] Therefore, we do not believe that the "protection" of the viewing and listening public against even allegedly one-sided presentations

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11); another participant argues that the media is biased "toward the business and commercial community." "Comments of the Maine Nuclear Referendum Committee" at 1. Still another commenter contends that the broadcast media unduly favors the views of the alleged "Zionist/Israeli lobby." Letter to the Chairman, Federal Communications Commission from Richard Hill and Donald W. Harris (Oct. 20, 1984).

310 *First National Bank of Boston v. Bellotti*, 435 U.S. at 791-92.

311 As the Supreme Court has asserted, "[t]he Constitution 'protects expression which is eloquent no less than that which is unconvincing.' " *Id.*, *quoting Kingsley International Pictures Corp. v. Regents*, 360 U.S. at 689.

affords a justifiable basis for the retention of the fairness doctrine.[312]

I. Summary

137. We believe the fairness doctrine is an unnecessary and detrimental regulatory mechanism. While we recognize that the fairness doctrine has been a central tenet of broadcast regulation for more than fifty years, we believe that we have a statutorily mandated duty to reassess the propriety of even long standing policies in light of changes in the broadcast marketplace and evidence that the policy may not further the public interest. After careful evaluation of the evidence of record, our experience in enforcing the fairness doctrine, and fundamental constitutional principles, we find that the fairness doctrine disserves the public interest.

138. Three factors form the basis for this determination. First, in recent years there has been a significant increase in the number and types of information sources. As a consequence, we believe that the public has access to a multitude of viewpoints without the need or danger of regulatory intervention.

139. Second, the evidence in this proceeding demonstrates that the fairness doctrine in operation thwarts the laudatory purpose it is designed to promote. Instead of furthering the discussion of public issues, the fairness doctrine inhibits broadcasters from presenting controversial issues of public importance. As a consequence, broadcasters are bundened with counterproductive regulatory restraints and the public is deprived of a marketplace of ideas unencumbered by the hand of government.

140. Third, the restrictions on the journalistic freedoms of broadcasters resulting from enforcement of the fairness doctrine contravene fundamental constitutional principles, accord a dangerous opportunity for governmental abuse and impose unnecessary economic costs on both the broadcasters and the Commission. Finally, we believe the record in this proceeding raises significant

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[312] Justice Douglas has stated that:

> The implication that the people of the country—except the proponents of the theory—are mere unthinking automatons manipulated by the media, without interests, conflicts, or prejudices is an assumption which I find quite maddening. The development of constitutional doctrine should not be based on such hysterical overestimation of media power and underestimation of the good sense of the American public.

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. at 152 n.3.

issues regarding the constitutionality of the fairness doctrine in light of First Amendment concerns.

IV. Modifications Short of Repeal and Alternatives to Current Enforcement of the Fairness Doctrine

141. In addition to those comments which favored complete repeal or retention of the fairness doctrine, a number of proposals were offered to modify the doctrine's scope or otherwise limit its application.[313] For example, several commenters urged elimination of or limitation on the scope of the *Cullman* doctrine corollary to the fairness doctrine.[314] Specifically, ABC proposed that ballot proposition advertising and advertising by independent political committees should be exempted from the *Cullman* doctrine. In lieu of *Cullman*, ABC recommended an approach modeled on the Commission's *Zapple* doctrine,[315] under which reasonable amounts, but not free, response time would be required as a means of achieving the Commission's fairness objectives. It was also urged by some commenters that all advertising be exempted from application of the fairness doctrine. Additionally, a two year moratorium on enforcement of the fairness doctrine was proposed as a means of empirically evaluating the impact of the doctrine on broadcast speech.

142. Beyond the above suggestions, the record reflects a number of proposals which have been previously considered by the Commission in connection with its fairness doctrine requirements. In this regard, Henry Geller again recommended that the current contemporaneous, case-by-case review of fairness doctrine complaints should be abandoned in favor of examining fairness compliance solely at renewal. It was also proposed that broadcast licensees be permitted to satisfy their fairness doctrine obligations by providing on-air "access" time to the public.

143. While these various proposals may present possibilities in

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[313] Several parties addressed elimination or retention of the Personal Attack Rule. However, as we stated in the *Notice* in this proceeding, our review here is limited to the fairness doctrine and does not include the Personal Attack Rule, which is the subject of a separate, pending proceeding. *Notice, supra* n.1 ¶ 9 n.10 and *Repeal or Modification of the Personal Attack and Political Editorial Rules* , 48 Fed. Reg. 28295 (June 21, 1983).

[314] For a discussion of the *Cullman* doctrine and its evolution, see n.119 *supra*.

[315] *Nicholas Zapple*, 23 FCC 2d 707 (1970). The Zapple doctrine requires that if supporters, or spokesmen, for one political candidate appear on a broadcast station, supporters for opposing candidates must be afforded similar treatment. However, the doctrine only applies to major political parties during formal campaign periods and does not require the provision of free time.

terms of reducing the intrusive impact of the fairness doctrine, we do not believe it is approproate to consider them at this time, given our intention to defer action on the fairness doctrine generally, pending review of the record in this proceeding by Congress.

V. Agency Authority to Modify or Repeal the Fairness Doctrine

144. Given our policy conclusions as to the continued undesirability of the fairness doctrine, the question arises whether we have the authority to eliminate or substantially modify the fairness doctrine. In this regard, issues pertaining to our statutory authority were clearly raised in the *Notice*[316] and addressed by numerous commenting parties in this proceeding. As we observed in the *Notice*, we do not believe that Congress explicitly codified the fairness doctrine prior to the 1959 Amendments to the Communications Act. Nor do we find that the fairness doctrine necessarily inheres in the public interest standard of the Communications Act. The 1959 amendments to the Communications Act pose a more difficult question. For the reasons we have earlier stated, however, we need not reach this question.[317] Rather, we will afford Congress an opportunity to review the record adduced in this proceeding. In order to provide a full and complete record in connection with such review, we have set forth below the arguments in this proceeding with respect to codification of the fairness doctrine.

A. Pre-1959 Period

145. We begin our examination of the legal authority of the Commission to eliminate or modify the fairness doctrine in the period prior to the 1959 amendments to ascertain whether or not the doctrine was codified either explicitly within the Communications Act or implicitly as part of the general obligation of broadcasters to serve the public interest.[318] In this regard, we note at the outset that neither the Radio Act of 1927 nor the Communications Act of 1934 contained any explicit provisions indicating that Congress intended to mandate that broadcasters

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[316] *See Notice*, *supra* n.1 at ¶¶ 96–120.

[317] *See* ¶ 7, *supra*.

[318] For a detailed examination of the pre-1959 period *See Staff Study of the House Committee on Interstate and Foreign Commerce, Legislative History of the Fairness Doctrine*, 90th Cong., 2d Sess. (Comm. Print. 1968) [hereinafter cited as "Manelli Report"].

provide fairness in their coverage of controversial issues of public importance.

146. Indeed, in 1927 Congress specifically addressed the question of whether or not there was a need to statutorily require fairness in the discussion of controversial issues of public importance. When enacting Section 18 of the Radio Act of 1927,[319] the forerunner of Section 315 of the present Communications Act, Congress had before it in the House of Representatives language in the bill, H. R. 9971 of the 69th Congress, that would have required broadcasters to provide equal access to "both the proponents and opponents of all political questions or issues."[320] At the same time, the Senate was considering a provision recommended to it by its Commerce Committee which would have prohibited broadcasters from discriminating in the use of their facilities "for the discussion of any question affecting the public."[321] Neither of these provisions survived the House-Senate Conference. The Conferees rewrote the radio bill without the proposed fairness-type language.[322] Since there was no explanation in the Conference Report as to why the fairness-type language was excluded, we must conclude that Congress did not desire to explicitly mandate a fairness type obligation on broadcasters at that time.

147. Section 18 of the Radio Act of 1927 became Section 315 of the Communications Act of 1934. Yet, before it was encacted into law, attempts were made in the Senate to enlarge the scope of this section to impose a fairness standard on any discussion of public questions to be voted upon at an election. Specifically, the language proposed in the Senate would have required that:

> if any licensee shall permit any person to use a broadcasting station in support of or in opposition to any candidate for public office, or in the presentation of views on a public question to be voted upon at an election, he shall afford equal opportunity to an equal number of other persons to use such station in support of an opposing candidate for such public office, or to reply to a person who has used such broadcasting station in support of or in opposition to a candidate, or for the presentation of opposite views

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[319] Section 18 of the Radio Act of 1927 read, in pertinent part:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station . . . .

(44 Stat. 1170).

[320] 67 Cong. Rec. 5,560-61 (1926).

[321] S. Rep. No. 772, 69th Cong., 1st Sess. (1926).

[322] H. R. Rep. No. 1886, 69th Cong., 2d Sess. (1927).

> on such public questions. Furthermore, it shall be considered in the public interest for a licensee, so far as possible, to permit equal opportunity for the presentation of both sides of public questions.[323]

In the House, the Committee on Interstate and Foreign Commerce reported a substitute bill that did not contain the provision providing for "equal opportunity" in the discussion of public questions.[324] Minus the proposed fairness-type language, the Conference Committee incorporated Section 18 verbatim as Section 315 of the Communications Act of 1934.[325] Once again attempts to include fairness-type language explicitly into the Communications Act had failed.

148. The 1952 amendments were the last revisions to Section 315 of the Communications Act prior to 1959. The 1952 Amendments to the Communications Act added another provision to section 315 which provided for uniformity of charges for political time vis-a-vis other uses. While in the House of Representatives, an amendment was offered to alter Section 315 to extend the "equal opportunity" provision to include statements made by authorized spokesmen of candidates,[326] this language was omitted from the bill by the Conferees.[327] Given these various attempts to legislatively mandate some form of fairness standard, it is apparent that, prior to 1959 at least, Congress had steadfastly refused to statutorily require broadcasters to provide fairness in the coverage of controversial questions and issues of public concern.

149. Despite the lack of legislative support for a mandatory fairness obligation, as evidenced in these early expressisons of legislative intent by Congress in not explicitly codifying the fairness doctrine,[328] the Federal Radio Commission and later the

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[323] *See* S. Rep. No. 781, 73d Cong., 2d Sess. (1934) This same "fairness" type provision in H. R. 7716, had been introduced during the 72d Congress, H. Rep. No. 2106, 72d Cong., 2d Sess. 6 (1933). This bill was passed by Congress, but subjected to a pocket veto by President Hoover. *See Manelli Report, supra* n.318.

[324] H. R. Rep. No. 1850, 73d Cong., 2d Sess. (1934).

[325] *See* H. R. Rep. No. 1918, 73d Cong., 2d Sess. 49 (1934).

[326] 98 Cong. Rec. 7415 (1952).

[327] H. R. Rep. No. 2426, 82d Cong., 2d Sess. (1952). This omission was particularly relevant since by this time the Commission had developed the fairness doctrine pursuant to the public interest standard of the Communications Act.

[328] Indeed, as pointed out in the *Manelli Report, supra* n.318, some of the failures to enact fairness type legislation "cast serious doubts on the proposition that the Fairness Doctrine, at least in substance, is a necessary corollary of the 'public interest' standard contained in the Radio Act, and carried forward into the 1934 Communications Act." *Id.* The United States Supreme Court, however, has admonished that "unsuccessful attempts at legislation are not the

Federal Communications Commission imposed fairness obligations upon broadcasters. As early as 1929, the Federal Radio Commission in *Great Lakes Broadcasting Co.*,[329] declared that "[i]n so far as a program consists of discussions of public questions, public interest requires ample play for the free and fair competition of opposing views, and the Commission believes that the principle applies . . . to all discussions of issues of importance to the public."[330] The Federal Communications Commission followed its predecessor by requiring that licensees cover both sides of controversial issues.[331] These decisions culminated in the issuance of the definitive statement of the fairness doctrine obligations for broadcasters. It was in the 1949 *Report of Editorializing by Broadcast Licensees*,[332] that the Commission fully set forth the two prong requirements of the fairness doctrine.

150. The fairness doctrine, as enunciated by the Commission in the *1949 Fairness Report*, was not developed pursuant to any specific command in the Act requiring that a broadcaster "devote a reasonable percentage of time to the coverage of controversial public issues" or that the broadcaster provide fairness in the coverage of such issues. Rather, it was promulgated pursuant to the "expansive" powers delegated by Congress under the Act in order that the Commission might regulate the "field of enterprise the dominant characteristic of which was the rapid pace of its unfolding."[333] In particular, the fairness doctrine developed under the general authority of the Commission to devise regulations to insure licensees broadcast in the "public interest, convenience, and necessity."[334] Based upon its perceptions of the communica-

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best guides to legislative intent." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 381 n.11.

[329] 3 FRC 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930).

[330] *Id.* at 33.

[331] *See Young People's Association for the Propagation of the Gospel*, 6 FCC 178(1938). Moreover, the Commission in *Mayflower Broadcasting Corp.*, 8 FCC 333 (1941), gave an even more expansive meaning to the public interest standard while at the same time giving a more restrictive view of broadcasters' latitude under that standard. Specifically, the Commission determined that "as one licensed to operate in the public domain the licensee has assumed the obligation of presenting all sides of important public questions, fairly, objectively and without bias . . . . These requirements are inherent in the conception of public interest set up by the Communications Act as the criterion of regulation." *Id.* at 340. While this decision was overturned because of its specific edict against editorializing by broadcasters, its interpretation of the public interest standard was carried forward in subsequent Commission cases.

[332] *See 1949 Fairness Report*, *supra* n.6.

[333] *National Broadcasting Company v. United States*, 319 U.S. at 219.

[334] *See* 47 U.S.C. §§ 303, 307(a), 309(a), 310(d). According to the United States

tions field in 1949, the Commission determined that "the public interest requires that the licensee must operate on a basis of overall fairness, making his facilities available for the expression of contrasting views of all responsible elements in the community on the various issues which arise."[335] Thus, the Commission from the inception of the fairness doctrine has recognized that the sole statutory basis for the doctrine was the general duty of licensees to serve the public interest.[336]

151. Proponents of the fairness doctrine contend that the Commission can not eliminate the doctrine because it is an inherent and necessary element of the general public interest standard.[337] We believe, however, that the obligations of licensees under the public interest standard, including the fairness doctrine, were never meant to be unsusceptible to change. Nor do we conclude that the sole power to make such alterations in Commission policies promulgated pursuant to the general public interest standard rests with Congress. This conclusion is aptly supported by the United States Supreme Court which has long recognized that the public interest standard is not inflexible, but is subject to the "rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors."[338] Over the years the Commission has often exercised its expert judgment and administrative experience to change policies once viewed by the Commission to be in the public interest. Given that the Commission is the expert agency in the field, courts have upheld the Commission's elimination of policies which were based solely on the public interest standard.[339] In so doing, the courts have generally relied heavily on the Commission's judgment regarding the best means to implement the broad public interest standard.[340] Indeed, the United States Supreme Court has posited that the Commission

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Supreme Court the public interest criterion "serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

[335] *1949 Fairness Report*, at 1250.

[336] *Id.* at 1254.

[337] *See, e.g.*, BCFM Comments, *supra* n.288 at 6-12; Geller/Lampert Comments, *supra* n.83 at 7-10; GM Comments, *supra* n.203 at 36-40; MAP/TRAC Comments, *supra* n.50 at 13-19; and Mobil Comments, *supra* n.128 at 12-17.

[338] *FCC v. Pottsville Broadcasting Co.*, 309 U.S. at 138.

[339] *See, e.g., FCC v. WNCN Listeners Guild, supra* n.193.

[340] *See FCC v. National Citizens Committee for Broadcasting*, 436 U.S. at 810 and *FCC v. WNCN Listeners Guild, supra* n.193; *see also UCC v. FCC, supra* n.193 and *Chisholm v. FCC*, 538 F.2d 349, 357 (D. C. Cir 1976).

should not hesitate to abandon existing policies "[i]f time and changing circumstances reveal that the 'public interest' is not served by application of the regulations."[341]

152. As we have already determined, as detailed above, the fairness doctrine no longer serves the public interest. Accordingly, if the only statutory basis for the fairness doctrine was the general public interest standard, the Commission upon a rationally based and clearly articulated finding would possess sufficient authority to abolish the doctrine.

B. The 1959 Amendments to the Communications Act

153. In 1959 Congress once again amended Section 315 of the Communications Act.[342] Primarily, the purpose of these amendments was to create an exemption from Section 315(a)'s equal opportunity requirement for certain types of news programs. After accomplishing its primary purpose in enacting the amendments, Congress set forth at the end of Section 315(a) a new proviso which apparently references the general fairness doctrine. In the *Notice*,[343] we offered three possible scenarios as to the possible statutory implications of the language espoused in the 1959 Amendments to the Communications Act. One construction of the amendments is that they were an explicit codification of the fairness doctrine in its entirety. The second possible interpretation is that the 1959 amendments only codified the fairness doctrine with respect to the political broadcasting realm to ensure that the purposes of the equal opportunities requirements would not be defeated by abuse of the newly created exemptions. A final construction is that Congress at that time did not codify the fairness doctrine at all, but merely acknowledged and preserved the Commission's policy in this area without statutorily mandating its continuance.[344] According to the arguments of the different commenting parties, evidence supporting all three propositions can be found in the statutory language of Section 315, as amended in the 1959 amendment to the Communications Act, its legislative history, subsequent court and legislative interpretations, as well as our own past interpretations.

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[341] *National Broadcasting Co. v. United States*, 319 U.S. at 225.

[342] *See Act of September 14, 1959*, §1, P. L. 66-274, 73 Stat. 556, amending 47 U.S.C. §315(a).

[343] *See Notice*, *supra* n.1 at ¶ 99.

[344] While different permutations of these constructions of the statutory implications of the 1959 amendments exist, we believe these three to be the most plausible.

1. The Statutory Language

154. We begin with the language in the statute itself. In this regard, we note that the United States Supreme Court has specifically concluded that "in determining the scope of a statute, one is to look first at its language" and "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."[345] Of peculiar relevance to our inquiry is the last sentence of Section 315(a) which provides that:

> Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and *to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.*[346] (emphasis added)

Although this language appears clearly to reference the fairness doctrine obligation, its precise statutory implications are unclear. In this connection, several parties argued that this language could be read as a Congressional enactment of the fairness doctrine since its wording is quite similar to the language found in the second prong of the fairness doctrine as enunciated in the *1949 Fairness Report*. Contrarily, other commenters took the position that Congress is amending Section 315 desired to make clear that it had not disturbed the Commission's fairness doctrine policy, but did not mandate its continuance. Major commenting parties have advanced strong arguments on both sides of this controversy as to the precise meaning to be accorded this language.[347] Commenters, such as the National Telecommunications and Information Administration (NTIA), assert that "[o]n its face Section 315(a), as amended in 1959, indicates that Congress understood the Fairness Doctrine to be embodied in the Federal Communica-

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[345] *North Dakota v. United States*, 460 U.S. 300, 312 (1983), *quoting Consumers Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). *See also United States v. Yermian*, 104 S. Ct. 2936 (1984) and *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982).

[346] 47 U.S.C. §315(a) (1984).

[347] Some Commenters contend that the language in the last sentence of Section 315(a) specifically addresses itself to fairness regarding "controversial issues" in general. *See, e.g.*, MAP/TRAC Comments, *supra* n.50 at 48. Other parties point out the Congress spoke in terms of the obligation as being "under this Act" this they contend provides support for the argument that the fairness doctrine is merely a Commission policy developed pursuant to delegated authority under the general public interest standard of the act and not to anything directly in the Act. *See, e.g.*, CBS Comments, *supra* n.83 at 110-111.

tions Act."[348] Likewise, other proponents have found the language in the last sentence of section 315(a) to "plainly" mean that Congress intended to codify the fairness doctrine.[349]

155. On the other hand the RTNDA contends that "[o]n its face this language provides only that the amendments should not be construed to *relieve* broadcasters of fairness obligations; it neither states nor implies that Congress intended to change in any way the nature of the statutory authorization for the doctrine."[350] Moreover, opponents of the fairness doctrine argue that if Congress had intended this language to codify the fairness doctrine, it would have made its intent clear, as it has done in many other enactments.[351] Because the "plain" language of the statute has been interpreted to stand for more than one proposition, we examined the legislative history of the 1959 amendments to ascertain congressional intent.[352]

2. Legislative History

156. Congress in the 1959 amendments to Section 315 was responding in an expedited fashion to overturn the Commission's *Lar Daly* decision and avoid its possible ramifications.[353] In *Lar Daly*, the Commission had rules that Section 315's "equal opportunities" requirements applied to appearances of political candidates on newscasts.[354] Subsequently, broadcasters warned that if Congress did not act to correct this novel Commission

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[348] "Comments of the National Telecommunications and Information Administration" at 5 [hereinafter cited as "NTIA Comments"].

[349] *See, e.g.*, MAP/TRAC Comments, *supra* n.50 at 31-34; Geller/Lampert Comments, *supra* n.83 at 4; and Ecumedia Reply Comments, *supra* n.39 at 7-9.

[350] RTNDA Comments, *supra* n.141 at 13. Similarly, NBC argues that this language was merely a "savings clause" in that Congress "left pre-existing law—the Commission's authority to interpret the 'public interest' standard of the Federal Communications Act—undisturbed." NBC Comments, *supra* n.86 at 102. *See also* CBS Comments, *supra* n.83.

[351] *See* NBC Comments, *supra* n.86 at 105 (NBC points out that Congress made explicit the codification of a Commission policy when it enacted §317 requiring the public announcement of any sponsorship of a political or other controversial broadcast.) *See also* CBS Comments, *supra* n.83 at 111.

[352] As the United States Circuit Court of Appeals for the District of Columbia Circuit has stated, "[c]onstruing a statutory term, however, requires more than a superficial and isolated examination of the statute's plain words. Ascertaining congressional intent requires us to examine the 'context in which the words are set—the statute's purpose, structure, and history' . . . . " *Multi-State Communications, Inc. v. FCC*, 728F.2d 1519, 1522 (D. C. Cir. 1984) *quoting Natural Resources Defense Council, Inc. v. EPA*, 725 F.2d 761, 769 (D.C. Cir. 1984). *See also Viacom International, Inc. v. FCC*, 672 F.2d 1034, 1040 (2d Cir. 1982).

[353] *Lar Daly*, 26 FCC 715 (1959).

[354] *Id.*

interpretation of Section 315 the result might be a blackout of radio and television news coverage of political campaigns, including the upcoming national political conventions.[355] To prevent such an occurrence, Congress moved swiftly to enact legislation providing exemptions for news-type programming. Congress was mainly concerned with overturning the Commission's decision. Consequently, both the original bills drafted in the House of Representatives and Senate dealt primarily with correcting through legislation the *Lar Daly* decision.[356] Accordingly, the legislative history lacks clear record evidence demonstrating a reasoned consideration of the fairness doctrine which would indicate an intent by Congress to codify the doctrine. While there do exist scattered references to the obligations of broadcasters under the public interest standard to present both sides of controversial public issues by some members of Congress, there was no significant discussion of the Commission's fairness doctrine.

157. However, the Senate Committee Report—probably in response to concerns voiced by the Commission and the Department of Justice—provided that:

> In recommending this legislation, the committee *does not diminish or affect in any way* Federal Communications Commission policy or existing law which holds that a licensee's statutory obligation to serve the public interest is to include the broad encompassing duty of providing a fair cross-section of opinion in the station's coverage of public affairs and matters of public controversy.[357] (emphasis added).

This language appears to suggest that the Senate Committee did not wish to abrogate the Commission's policy developed pursuant to the Commission's delegated authority under the general public interest standard of the Act. It is argued that this language implies that the Senate did not intend to change the broadcasters

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[355] *See, e.g.*, 105 Cong. Rec. 14,447 (1959) (Remarks of Senator Hartke).

[356] *See* S. Rep. No. 562, 86th. Cong., 1st Sess. (1959) and H. R. Rep. No. 802, 86th. Cong., 1st Sess. (1959).

[357] S. Rep. No. 562 at 13. The Senate Committee specifically included a letter from the Department of Justice suggesting that Congress in amending section 315 should not abolish fairness obligations. Specifically, the Department of Justice stated that "care should be taken lest present requirements of fair treatment of public issues be weakened." The Department added that "under existing law, the Commission has held that a licensee's statutory obligation to serve the public interest includes the broad all-encompassing duty of providing a fair cross-section of opinion in the station's coverage of public affairs and other matters of controversy. This general fairness standard is presently applicable to political broadcasting not coming within the coverage of section 315." *Id.* at 19 (citations omitted).

existing statutory obligation to provide fairness in the coverage of controversial issues of public importance. This does demonstrate that the Senate was ambivalent, at least initially, as to whether the fairness doctrine was a Commission policy that was grounded in the statutory obligation of broadcasters to serve the public interest. It may also suggest that Senate concerns focused primarily upon the doctrine's role in ensuring fair coverage of candidates should the "news" exemption to Section 315 be enacted.

158. When the bill came up for debate in the Senate, a floor amendment was offered by Senator Proxmire. This amendment would have added to section 315 a new provision providing that:

> but nothing in this sentence shall be construed as changing the basic intent of Congress with respect to the provisions of this Act, which recognizes that television and radio frequencies are in the public domain, that the license to operate in such frequencies requires operation in the public interest, and that in newscasts, news interviews, news documentaries, on-the-spot coverage of news events, . . . all sides of public controversies shall be given as equal an opportunity to be heard as is practically possible.[358]

Upon a recommendation by Senator Pastore the phrase "as equal an opportunity" found in the last part of the Proxmire amendment was revised to read "as fair an opportunity."[359] Senator Pastore in offering this alternation explained that this new language "merely expresses the philosophy that the media of radio and television are in the public domain, and that they must render, under the law, public service, and that wherever it is practical and possible the situation must bring to light all sides of a controversy in the public interest . . . ."[360] While Senator Pastore had referred to the Proxmire amendment as "surplusage,"[361] he nonetheless stated that he understood "the amendment to be a statement or codification of the standards of fairness . . ." and that the Commission was "obliged by existing

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[358] 105 Cong. Rec. 14,457 (1959). Senator Proxmire in offering his amendment stated that the purpose of the amendment was to put into the Act the declaration made on page 13 of the Committee Report and thus a part of the statute make it binding. *Id.* While we believe the language found on page 13 of the Senate Committee Report, *supra* n.356, only sought to preserve the Commission's existing policy, the language proposed by Senator Proxmire appears to be more of an explicit codification of the fairness doctrine.

[359] *Id.*

[360] *Id.*

[361] Senator Pastore stated that he believed "we have already accomplished the purpose of the Senator's amendment. We have expressed it in the report." *Id.* at 14,457.

law and policy to abide by the standards of fairness."[362] Thus, it appears that at least some of the Senators viewed the Proxmire amendment as an attempt to codify the fairness doctrine.[363]

159. Unlike the Senate bill, the bill reported out of the House of Representatives dealt almost exclusively with correcting the situation brought about by the Commission's *Lar Daly* decision.[364] No specific amendment with respect to the general fairness doctrine was passed by the House of Representatives. The House members did, however, reject in a floor vote an amendment which would have required broadcasters to provide "equal opportunities" to opposing "representatives of any political or legislative philosoph[ies]."[365]

160. Because of differences in the bills reported out of the House of Representatives and Senate, the respective bills were sent to a House-Senate Conference.[366] Within this Conference, the language of the Proxmire Amendment was altered by the Conferees to its present form.[367] In the Conference Report[368] the Conferees, in referring to their inclusion of language which referenced the fairness doctrine, explained in a short statement that "there is nothing in this language which is inconsistent with the House substitute. It is a restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under

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[362] 105 Cong. Rec. at 14,462.

[363] There is still some doubt as to whether the Proxmire amendment if enacted would have codified the fairness doctrine in its entirety, especially in light of the fact that the majority of what little debate there was on the amendment centered on questions relating to fairness in the political broadcasting realm. *See Notice*, *supra* n.1 at ¶ 110.

[364] However, it should be noted that in the House Committee debates there is evidence that members believed that broadcasters were already subject to a statutorily required fairness obligation. For example, Representative Cellar stated that:

> broadcast licensees would continue to remain subject to their present statutory duty to operate in the public interest. Under this general, overall standard of licensee responsibility, the Commission requires a licensee to be fair in the presentation of opposing views on controversial public issues.

105 Cong. Rec. 16,227 (1959).

[365] Id. at 16,245.

[366] H.R. Rep. No. 1069, 86th Cong., 1st Sess. (1959). The non-inclusion of any fairness doctrine language in the House of Representatives was not the sole difference between the two bills.

[367] The United States Supreme Court in *Red Lion Broadcasting Co. v. FCC*, *supra* n.10 in dictum stated that the original Proxmire language "constituted a positive statement of doctrine and was altered to the present merely approving language in the conference committee." *Id.* at 383-84 (footnote omitted) *See* ¶ 166, *infra*.

[368] H.R. Rep. No. 1069, 86th Cong., 1st Sess. (1959).

the Communications Act of 1934."[369] Thus, there was no discussion in the Conference Report explaining why the Proxmire language was altered. Moreover, the Conference Report failed to explain whether the original intent of the Proxmire amendment had been retained in this new proviso. In this connection, we also note that the Conference Report explains that there was nothing in the language inconsistent with the House substitute. In light of the fact that the House bill did not contain any fairness language, the lack of a major discussion of the inclusion of fairness doctrine language suggests that this provision was not viewed as being controversial. However, we are not certain as to the reason this was not a controversial issue. In this regard, it appears that there are several plausible rationales for the lack of discussion on this provision in the Conference Report. First, it could be that Congress was merely making explicit what it already considered to be a statutory obligation under the public interest standard. Second, there is a possibility that because Congress was only preserving a Commission policy and not mandating its continuance there was no need for a discussion.[370] Further, if the provision was largely understood as intended only to ensure fair treatment of candidates in programming exempted from Section 315's equal opportunities provisions, there may have been general agreement that the proviso was desirable. Finally, it should be noted that, at the time, the fairness doctrine was enforced only at renewal, and some legislators believed it has little practical effect on licensees.[371]

161. In the post-Conference debates in both Houses, the Conferees in introducing the revised version of the bill made an effort to explain that the Proxmire amendment had been retained, at least in spirit. In particular, Representative Harris stated that:

> Now, just in case anybody in the broadcasting industry or in the Federal Communications Commission, or even a candidate himself, should get the idea that the reins are off; you can do what you want to, we have accepted in the Conference substitute a provision similar to what was referred to as the Proxmire amendment in the other body.[372]

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[369] *Id.* at 5.

[370] Parties, such as MAP/TRAC, have argued that this language proves that Congress intended to codify the fairness doctrine. *See* MAP/TRAC Comments, *supra* n.50 at 29-34. Other parties point out it is mere recognition of the Commission's policy pursuant to the public interest standard in the Act. *See* CBS Comments, *supra* n.83 at 111.

[371] *See Notice*, *supra* n.1 at ¶ 112.

[372] 105 Cong. Rec. 17,778 (1959). In addition, Representative Harris, stated that the Conferees "went further than that to be sure that there was no advantage taken by the broadcasting industry or anyone else and reaffirmed the 'standard

Likewise, in the Senate debates, Senator Pastore pointed out that "while the House conferees found some fault with the so-called Proxmire amendment, we insisted it be retained in the bill, if with some slight modifications, because it was the one condition we could write into the law to make sure the Federal Communications Commission would give the matter the right interpretation."[373]

162. These statements may lend some support for the proposition that a byproduct of the 1959 Amendments was a codification of the fairness doctrine. In the House of Representatives, however, the dialogue between Representatives Avery and Harris lends support to the contrary position that Congress intended solely to preserve the fairness doctrine. Specifically, Representative Avery questioned whether or not the "standard of fairness still prevails in the basic Act irrespective of any changes that were made in Section 315" and that "it applies not only to political candidates, but issues and editorializing by licensees as well."[374] In response, Representative Harris agreed that the standard remained and added that the conferees "discussed this particular item" and "agreed that the standard of fairness must prevail, and applies to the programs which will be exempted from the equal-time requirements of Section 315."[375] As demonstrated by these discussions, the majority of the debate on the fairness doctrine in both Houses centered around assuring that despite the new amendment the doctrine remained in the context of political broadcasting. This is understandable since the reason for Congress' action was overturning the *Lar Daly* decision.

163. While this appears to have been the focus of most of the debates, in the Senate at least one Senator believed that the fairness doctrine was being codified in its entirety. Specifically, Senator Scott pointed out that:

> [W]e have maintained very carefully the spirit of the Proxmire amendment, and I ought to point out . . . that the phrase "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance" does not refer merely to political discussions as such or to opposing views of political parties or of candidates. It is intended to encompass all legitimate areas of public importance which are

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of fairness' established under the Communications Act." *Id.*

[373] *Id.* at 17,830.

[374] *Id.* at 17,779.

[375] *Id.*

> controversial . . . and it is intended that no one point of view shall gain control over the airwaves to the exclusion of another point of view.[376]

Senator Case, however, did immediately afterwards endorse everything that Senator Scott stated and everything stated in the Conference Report.[377] None of the other Senators offered any remarks on the correctness of Senator Scott's statement.

164. We also found other statements in the legislative history which suggested that some members did believe that the fairness doctrine should not be a mandatory obligation. In particular, we note the statement of Representative Brown who expressed regret that the final bill "does not go quite as far as I would like toward giving freedom of information over the radido and television such as is enjoyed by the press of the Nation."[378] While there are a few statements throughout the legislative history discussing the fairness obligation, there is no evidence that clearly demonstrates an intent by Congress to codify the doctrine. Although as NBC observes "[t]he legislative discussion of the fairness doctrine cannot achieve what the statutory language fails to do,"[379] neither the statutory language nor the legislative history of section 315 provides a satisfactory answer to the question of congressional intent.

3. Judicial Interpretations of the 1959 Amendments.

165. As CBS points out the question of whether or not Congress has enacted the fairness doctrine as a statutory mandate has never been directly considered by any court.[380] In *Red Lion Broadcasting Co. v. FCC*,[381] the United States Supreme Court in upholding the personal attack and political editorializing rules did however provide dictum pertaining to the statutory implications of the 1959 Amendments to the Communications Act. Proponents and opponents alike have cited the *Red Lion* decision as supporting their respective positions concerning the statutory nature of the fairness doctrine. While the Court did examine the legislative history of Section 315, it failed to reach a clear conclusion as to whether the doctrine was codified. In this regard, we note that after citing the language at the end of

[376] *Id.* at 17,831.
[377] *Id.* at 17,832.
[378] *Id.* at 17,781.
[379] "Reply Comments of National Broadcasting Company, Inc." at 21. [hereinafter cited as "NBC Reply Comments"].
[380] *See* CBS Comments, *supra* n.86 at 124.
[381] 395 U.S. 367 (1969).

Section 315(a) the Court stated:

> [t]his language makes it very plain that Congress, in 1959, announced that the phrase "public interest," which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues.[382]

As proponents of the fairness doctrine contend this language suggests that the Court "viewed Congress' action as a codification of the FCC's interpretation that the fairness doctrine was an inextricable element of the 'public interest' section of the Act."[383] In addition, the *Red Lion* Court stated that "[h]ere, the Congress has not just kept its silence by refusing to overturn the administrative constructio, but has ratified it with positive legislation."[384]

166. Although this language implies that the *Red Lion* Court believed the 1959 amendments to be an explicit codification of the fairness doctrine, other language found in the decision just as equally suggests that it was only codified with respect to the political broadcasting realm or not at all. In particular, the Court stated that Congress "knowingly preserved the FCC's complementary efforts."[385] In this connection, we note that preservation of a Commission policy indicates that it is not a mandatory obligation of broadcasters and does not foreclose our discretion to later reevaluate that policy. Moreover, the Court in referring to the Proxmire amendment states that:

> [t]his amendment, which Senator Pastore, a manager of the bill and a ranking member of the Senate Committee, considered "rather surplusage," constituted a *positive statement of doctrine* and was altered to the present *merely approving language* in the Conference Committee.[386] (emphasis added).

Commenters who argue that the fairness doctrine is not statutory,

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[382] *Id.* at 380.

[383] MAP/TRAC Comments, *supra* n.50 at 35-36. This proposition is supported by the Court's subsequent statement that the congressional action in 1959 was a vindication of the "FCC's general view that the fairness doctrine inhered in the public interest standard." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 380.

[384] *Id.* at 381-82 (footnote omitted). The NTIA cites *Black's Law Dictionary* for the proposition that "[r]atification means the adoption of the act of another as one's own act, with the resulting responsibility for the consequences of that act." Reply Comments of the National Telecommunications and Information Administration" at 14 [hereinafter cited as "NTIA Reply Comments"]. In light of the subsequent statements made in the *Red Lion* decision, we are not certain what the Court reference to the doctrine having been ratified meant.

[385] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 385.

[386] *Id.* at 383-84 (citations omitted).

contend that this language proves that the Court viewed the proviso as not mandating, but merely endorsing the Commission's then existing policy.[387] For example, CBS contends that the Court's analysis in *Red Lion* "made clear that the doctrine was not being displaced by the exemptions to the equal time provisions, it did not deprive the Commission of the power later to determine that the public interest would be better served by the doctrine's rescission."[388]

167. Four years later the United States Supreme Court in *Columbia Broadcasting System v. Democratic National Committee*[389] also in dictum addressed the statutory implications of the 1959 Amendments to the Communications Act. However, the Court once again used ambiguous terminology in referring to the fairness doctrine. Therein, the Court stated that "[i]n 1959, Congress amended §315 of the Act to give *statutory approval* to the Fairness Doctrine."[390] Standing alone this language could suggest that the Court understood the 1959 amendments to codify the fairness doctrine. Contrarily, this same statement could stand for the proposition that Congress was recognizing and approving the doctrine, but not mandating its retention. Moreover, in the same footnote the Court while discussing Congress' enactment of § 312(a) states that "[t]his amendment essentially codified the Commission's prior interpretation of § 315(a) as requiring broadcasters to make time available to political candidates."[391] If the Court had meant to suggest that the fairness doctrine was codified, it could have stated that the fairness doctrine had been codified as it did in reference to § 312(a). We are not certain if the Court's choice of the term "statutory approval" was meant to suggest that the fairness doctrine is not statutory. Moreover, Justice William Brennan joined by Justice Thurgood Marshall in a dissenting statement determined that:

> The statutory authority of the Commission to promulgate this doctrine and related regulations derives from the mandate to the "Commission from time to time, as public convenience, interest, or necessity requires," to promulgate "such rules and regulations and prescribe such restrictions and

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387 *See* RTNDA Comments, *supra* n.141 at 21.
388 *See* CBS Comments, *supra* n.83 at 125 (footnote omitted).
389 412 U.S. 94 (1973). (The Court upheld the Commission's determination that the public interest would not be served by requiring broadcasters to accept editorial advertisements).
390 *Id.* at 113 n.12 (emphasis added).
391 *Id.*

> conditions . . . as may be necessary to carry out the provisions of [the Act] . . . "[392] (citations omitted)

That these Justices concluded that the "Fairness Doctrine was recognized and implicitly approved by Congress in the 1959 amendments to § 315 of the Act,"[393] suggests, as evidenced by the above statement, that they did not necessarily view it as having been mandated by section 315 of the Act. We have no evidence as to whether the other Justices agreed with this interpretation.

168. Because the United States Supreme Court so far has not given a definitive answer on whether or not the fairness doctrine has been explicitly codified into the Communications Act, we examined the cases in the United States Circuit Courts of Appeal. While some of these courts have, in passing, discussed the statutory nature of the fairness doctrine, none has specifically addressed in a reasoned decision the question of whether or not the fairness doctrine is codified. The Courts, which in dictum state that the fairness doctrine was codified in 1959, generally do not discuss the rationale behind their conclusions. Indeed, many of these Courts have adopted — without any discussion as to its correctness — the Commission's interpretation on whether or not the fairness doctrine was codified as part of the Communications Act.[394] Other Courts have relegated their discussion of the statutory nature of the fairness doctrine to a sentence or two in a footnote.[395]

169. At least one Court has specifically determined that the fairness doctrine has not been codified. The United States Circuit Court of Appeals for the First Circuit in *Public Interest Research Group v. FCC*[396] in upholding the Commission's determination that the fairness doctrine would only apply to commercial advertisement that spoke in an obvious and meaningful way to public issues stated, in dictum, that the "fairness doctrine is *not a*

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[392] *Id.* at 185 n.16. (Brennan, J., dissenting).

[393] *Id.* at 185 n.15. (citations omitted).

[394] *See, e.g., Green v. FCC*, 447 F.2d 323, 327 n.6 (D.C. Cir. 1971) (the Court cited the FCC's ruling *In re Obligations of Broadcast Licensees Under the Fairness Doctrine*, 23 FCC 2d 27, 28 (1970) and *Brandywine — Mainline Radio, Inc., v. FCC*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied* 412 U.S. 922 (1973) (The Court quoted the FCC's opinion in *Committee for the Fair Broadcasting of Controversial Issues*, 25 FCC 2d 283, 291 (1970). In this regard, we note that both of these Commission decisions cited by the courts found the fairness doctrine to have been codified in the 1959 Amendments.

[395] *See, e.g., Maier v. FCC*, 735 F.2d at 225 n.5 and *Banzhaf v. FCC*, 405 F.2d at 1095 n.49.

[396] 522 F.2d 1060 (1st Cir. 1975).

creature of statute but was evolved over the years by the Commission under the 'public interest' standard of the Communications Act."[397] Moreover, the Court declared that Congress only "acknowledged and generally endorsed the Commission's adoption of fairness standards."[398]

170. In *Straus Communications, Inc. v. FCC*,[399] the court found that the fairness doctrine "received explicit statutory recognition in the 1959 amendments."[400] The precise ramifications of Congress giving "statutory recognition" are unclear. Moreover, the Court made this statement without any substantive discussion indicating its meaning.

4. Commission Interpretations of the 1959 Amendments

171. Although some Courts have relied upon Commission interpretation of the fairness doctrine's statutory nature, the Commission itself has not steadfastly found the doctrine to have been codified. Over the years, the Commission has reassessed the implications of the 1959 amendments to the Communications Act. While some Commission decisions have without much discussion assumed that Congress codified the doctrine in 1959,[401] other Commission determinations have found that Congress only "ratif[ied] the Commission's then-existing policy concerning application of the Fairness Doctrine to news broadcasts."[402] And still other Commission decisions have been ambivalent on whether the

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[397] *Id.* at 1066 (emphasis added). Complainants in this case had specifically argued that the fairness doctrine was codified. However, the Court concluded that Congress had delegated under the general public interest standard the enforcement of the fairness doctrine.

[398] *Id.* (citations omitted).

[399] 530 F.2d 1001 (D.C. Cir. 1976).

[400] *Id.* at 1007 n.11. *See also American Security Council Education Foundation v. FCC*, 607 F.2d 438 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980). The District of Columbia Circuit Court of Appeals therein stated that "[i]n 1959, Congress confirmed the Commission's view that the fairness doctrine was part of the public interest standard" *Id.* at 443 n.12.

[401] *See Study of Fairness Doctrine*, 30 FCC 2d 26, 26-27 (1971) and *1974 Fairness Report*, *supra* n.3. It should be once again pointed out that the *1949 Fairness Report*, *supra* at n.6, found the doctrine to be statutory solely under the general public interest standard.

[402] *Report and Order* in BC Docket No. 81-741, FCC 83-120, 53 RR 2d 1309 (1983). *See also Notice of Proposed Rule Making* in MM Docket No. 83-331, FCC 83-130 (released May 25, 1983). (Commission stated that Fairness Doctrine was "statutorily approved" by Congress). We also note that then Chairman Richard E. Wiley in a separate statement to the reconsideration of the *1974 Fairness Report* concluded that "The literal wording of the statute indicates only that the Commission's fairness policies were left undisturbed. . . ." *Memorandum Opinion and Order on Reconsideration of the Fairness Report*, 58 FCC 2d at 700 (separate statement of Chairman Wiley).

doctrine was codified.[403] Thus, the Commission has never definitively concluded that the fairness doctrine was codified in 1959.

5. Subsequent Congressional Interpretations of the 1959 Amendments

172. Finally, we examined subsequent statements by Congress, including the statements of key figures in the 1959 amendment to section 315, to ascertain Congressional views on the statutory nature of the fairness doctrine. Once again we discovered there was evidence both supporting the codification proposition and opposing it. We begin with those statements suggesting that Congress in 1959 codified the fairness doctrine. In particular, Senator Pastore during congressional hearings in 1963 on further amending the equal time provision, implied that section 315 codified the fairness doctrine and that if there were any changes made to section 315, "there ought to be a restatement on the fairness doctrine."[404] Moreover, Senators Pastore and Proxmire in a 1975 hearing on bills to eliminate the fairness doctrine, gave their beliefs that the doctrine had been codified in 1959. Specifically, in his opening statement, Senator Proxmire explained that:

> Although the fairness doctrine dates back to 1949 in a sophisticated form, it was not until 1959 that it was recognized in the United States Code. I had a hand in putting it there.[405]

This conclusion was expanded upon by Senator Pastore who simply stated "we codified [the fairness doctrine] in 1959."[406]

173. There also exists subsequent legislative statements suggesting that even Congress itself was not certain whether the fairness doctrine has been codified.[407] In this connection, we note that in 1968, less than ten years after the amendments to section 315, a study of the legislative history of the fairness doctrine was prepared for the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce,[408]

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[403] *See Notice of Proposed Rule Making* in MM Docket No. 83-670, 94 FCC 2d 678, 706 n.50 (1983).

[404] *Equal Time: Hearings on S.251, S.252, S.1696, and H.J. Res. 247 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 88th. Cong., 1st Sess. 59 (1963). *See also* NTIA Comments, *supra* n.348 at 9.

[405] *Fairness Doctrine: Hearings on S.2, S. 608 and S.1178 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 94th. Cong., 1st. Sess. 13 (1975).

[406] *Id.*

[407] *See, e.g., Notice supra* n.1 at ¶ 111 n.157.

[408] *Manelli Report, supra* n.318.

(Manelli Report). The Manelli Report, after an exhaustive study of the legislative history, concluded that "the legislative history of the Communications Act with respect to the Fairness Doctrine does not establish whether the doctrine should properly be considered a part of the statute."[409] In addition, the Manelli Report contended that Congress "intended neither approval nor disapproval of it (fairness doctrine), but merely intended to ensure that Section 315 would not interfere with it."[410] The Senate also issued a staff study in 1968 which determined that "Section 315 is a congressional enactment and the 'fairness doctrine,' although a qualifying reference to it apears in section 315, is not."[411] However, it did find that the "public interest, convenience, and necessity, requires each broadcast licensee to devote a reasonable percentage of his broadcast time to the presentation of programs dealing with issues of interest in the community served by the particular station."[412]

174. As demonstrated by the conflicting evidence found in the record, reaching a conclusion as to whether or not Congress has mandated our retention of the fairness doctrine is a difficult determination. We believe it unnecessary, however, to reach a definitive conclusion on this matter given our determination to defer action concerning the fairness doctrine pending review by Congress of the record compiled in this proceeding.

VI. Conclusion

175. Based on the voluminous record compiled in this proceeding, our experience in administering the doctrine and our general expertise in broadcast regulation policy determinations, we believe that as a policy matter the fairness doctrine no longer serves the public interest. Moreover, the development of the information services marketplace makes unnecessary any governmentally imposed obligation to provide balanced coverage of controversial issues of public importance. Furthermore, we have found that far from serving its intended purpose, the doctrine has a chilling effect on broadcaster's speech. Accordingly, we have questioned the permissibility of the doctrine as a matter of both policy and constitutional law.

176. Notwithstanding these conclusions, we have decided not to

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[409] *Id.* at 28.
[410] *Id.* at 29.
[411] *Staff Report of the Senate Committee on Commerce*, 90th. Cong., 2d Sess. 4 (Comm. Print. 1968).
[412] *Id.*

eliminate the fairness doctrine at this time. The doctrine has been a longstanding administrative policy and a central tenet of broadcast regulation in which Congress has shown a strong although often ambivalent interest. Indeed, while Congress has not yet chosen to eliminate the doctrine legislatively, several members of Congress have recently sponsored bills seeking to abolish the fairness doctrine and its related policies.[413] Congress also has held hearings to determine whether or not it should enact legislation to eliminate the doctrine.[414] In addition, we recognize that the United States Supreme Court in *FCC v. League of Women Voters of California*[415] has similarly demonstrated an interest in our examination of the constitutional and policy implications underlying the fairness doctrine. Because of the intense Congressional interest in the fairness doctrine and the pendency of legislative proposals, we have determined that it would be inappropriate at this time to eliminate the fairness doctrine. Given our decision to defer to Congress on this matter, we also believe that it would be inappropriate for us to act on the various proposals to modify or restrict the scope of the fairness doctrine. It is also important to emphasize that we will continue to administer and enforce the fairness doctrine obligations of broadcasters and to underscore our expectation that broadcast licensees will continue to satisfy these requirements.

177. Accordingly, IT IS ORDERED, THAT this proceeding IS TERMINATED.

178. IT IS FURTHER ORDERED, THAT the motions requesting acceptance of late-filed pleadings ARE GRANTED.

179. IT IS FURTHER ORDERED, THAT the "Application for Review" filed by the Media Access Project is DENIED.

180. IT IS FURTHER ORDERED, THAT the Secretary SHALL CAUSE this *Report* to be printed in the Federal Communications Commission Reports.

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[413] *See, e.g.*, S.1038, 99th Cong., 1st Sess. (1985); S. 22, 99th Cong., 1st Sess. (1985); H.R. 5585, 97th Cong., 2d Sess. (1982); and S. 22, 98th Cong., 1st Sess. (1983).

[414] *See, e.g., Freedom of Expression Act of 1983: Hearings on S.1917 Before the Committee on Commerce, Science, and Transportation*, 98th Cong., 2d Sess. (1984). Senator Bob Packwood also requested that a staff report prepared by the National Telecommunications and Information Administration be printed for use by the Senate Committee on Commerce, Science, and Transportation. *Print and Electronic Media: The Case for First Amendment Parity Printed at the Direction of Senator Bob Packwood for the Committee on Commerce, Science, and Transportation*, 98th Cong., 1st Sess. (1983). This study examined in detail whether there should be first amendment parity between the print and electronic media.

[415] 104 S.Ct. 3106 (1984). *See* ¶ *15, supra.*

181. IT IS FURTHER ORDERED, THAT the Secretary SHALL FORWARD copies of this *Report* to the appropriate Committees and Subcommittees of the House of Representatives and the Senate.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix

*Parties Submitting Formal Comments in Gen. Docket No. 84-282**

Accuracy in Media

American Advertising Foundation

American Association of Advertising Agencies

American Broadcasting Co. ("ABC")

American Cancer Society

American Civil Liberties Union ("ACLU")

American Heart Association

American Jewish Committee

American Jewish Congress

American Legal Foundation ("ALF")

American Newspaper Publishers Association

Antidefamation League of the B'nai B'rith

Arizona Television Co.

Ashville Musicians and Artists for a Sane Environment

Association of National Advertisers

Black Citizens for a Fair Media/Citizens Communications Center/League of United Latin American Citizens/National Association of Better Broadcasting

*For purposes of compiling this list of parties filing comments and reply comments, a filing was considered "formal" if it included the correct docket number and the proper number of copies were submitted.

("BCFM et. al.")

CBS, Inc. ("CBS")

Committee for Community Access

Common Cause

Democratic National Committee

Eagle Forum

Elba Development Corp/Multimedia, Inc. and Providence Journal Co.

Forward Communications Co., *et al.*

Foundation for the Arts of Peace

Freedom of Expression Foundation ("FEF")

General Motors/International Paper Co./Campbell Ewald Co. ("General Motors *et al.*")

Henry Geller/Donna Lampert

Glass Packaging Institute

Robert C. Greene

KGRL 940 (Gary Capps)

KIPR 95.FM

KMAN (B. Thornton)

Pamela Magasich

Maine Nuclear Referendum Committee

Luther Martin

Media Action Project Telecommunications Research and Action Center ("MAP/TRAC")

Meredith Corp.

Midwest Family Group

Mobil Corp.

National Association of Broadcaster ("NAB")

National Broadcasting Co. ("NBC")

National Cable Television Association

National League of Cities

National Radio Broadcasters Association

National Rifle Association of American

National Telecommunications and Information Administration ("NTIA")

People for the American Way

Post-Newsweek

Public Broadcasting Service and National Association of Public Television

Stations
Public Media Center
Radio Television News Director Association
Society of Professional Journalists
Tribune Broadcasting Co.
United States Catholic Conference
Office of Communications of the United Church of Christ
Westinghouse Broadcasting and Cable ("Group W")
Yes to Stop Calloway Committee

Parties Submitting Formal Reply Comments

Actors Equity Guild *et. al.*
American Arab Anti-Discrimination Committee
ABC
ACLU
American Federation of Labor and Congress of Industrial Organizations
ALF
Authors League of American
Byron Bailer
Toni Bean
BCFM, *et al.*
Eric Buchanan
Deborah Bynum
Laura Byrd
CBS
Center for Science in the Public Interest
Sharon Chambers
Choosing Our Future
Committee for Responsible Investment, Medical Mission Sisters
Department for Professional Employees, AFL-CIO
Ecumedia
Donise Edwards
Janis Ernst
Cheryl N. Freeman
FEF
Alyce F. Gaither
Henry Geller/Donna Lampert

General Motors *et al.*

Sidney Hall

John Harvey Kentucky Fair Tax Coalition

Catherine LaMarr

Andrew Lee

Mark Loud

Shari Mauney

MAP/TRAC

NAB

National Bar Association/National Association for the Advancement of Colored People

NBC

National Coalition to Ban Handguns

NTIA

Kay Pierson

Robert Rivers

Rhonda Rhea

Rosemary Ryan, M.D. *et al.*

Safe Energy Alliance of Alabama

Jennifer Small

United States Catholic Conference

United States Public Interest and Research Group

Telecommunications Research and Action Center

Cheryl Thompson

Laurie Washington

Group W

Yvette Williams

August 7, 1985

STATEMENT OF MARK S. FOWLER, CHAIRMAN

Re: Fairness Doctrine Report

250 years ago this week, a publisher named John Peter Zenger was on trial. Zenger ran the Weekly Journal, a New York paper that had reprinted the letters of two Whig journalists who had argued in their essays for freedom of the press, that "freedom of speech is ever the symptom as well as the effect of good government." For this, and for being a critic of the British authorities, Zenger had been charged with seditious libel by the

Governor General of New York. He spent almost a year in jail awaiting trial. Although he was surely guilty under the prevailing laws at the time, the jury acquitted Zenger.

The lessons of the Zenger trial have never been lost on the United States, nor on this Commission. Today's report is linked to this country's tradition of people to criticize their government without recrimination or licensing.

Justice William O. Douglas foreshadowed this viewpoint in his own repudiation of the Fairness Doctrine 12 years ago. He said: "The Court . . . by endorsing the Fairness Doctrine sanctions a federal saddle on broadcast licensees that is agreeable to the traditions of nations that never have known freedom of press and that is tolerable in countries that do not have a written constitution containing prohibitions as absolute as those in the First Amendment."[1]

This very week the British Broadcasting Corporation experienced a walk-out of its journalists. They did not strike over wages or seniority, but over the matter that concerns us today: their freedom of the broadcast press to cover a controversial issue of public importance in the manner they saw fit. Justice Douglas was right: there is a difference amongst the nations of this world that have a constitutional protection against restraints on press and those that, unhappily, do not.

So it is freedom, then, that is at the heart of this exemplary example of draftsmanship from the Mass Media Bureau. I have made the advancement of First Amendment rights an uppermost objective of my Chairmanship. I feel pride and satisfaction that we have a report that comprehensively reviews the operation and context of the Fairness Doctrine and considers the comments of all those who participated in our proceeding. It responds to the arguments of proponents and opponents of the Fairness Doctrine in a scholarly and responsible manner.

Today's report is an indictment of a misguided government policy. It is a recital of its shortcomings, both legal and practical. The First Amendment dictates: Choose between the right of the press to criticize freely and the authority of the government to channel that criticism. Today's order is a statement by this Commission that we should reverse course, and head ballistically toward liberty of the press for radio and television. Free speech and free government thrive together or they fail together. John

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[1] Columbia Broadcast System v. Democratic Nat'l Comm., 412 U.S. 94, 817-18 (1973) (concurring opinion).

Peter Zenger said that. William O. Douglas said that. And today, so do we.

August 7, 1985

Concurring Statement of FCC Commissioner James H. Quello

In re: Inquiry into the General Fairness Doctrine Obligations of Broadcast Licensees.

This *Report* contains a very well reasoned and persuasive indictment of the fairness doctrine. It presents conclusive evidence that the doctrine is unnecessary and that it does not further its purpose of encouraging the presentation of controversial issues of public importance. The *Report* strongly documents its ultimate conclusion that the fairness doctrine does not serve the public interest, and I fully support that conclusion.

I wish to emphasize, however, my determination that this record compels the conclusion that Congress intended to codify the fairness doctrine as part of the 1959 amendments to the Communications Act.[1] The Commission has long acquiesced in the view that the fairness doctrine was codified by these amendments,[2] and, thus, the burden of proof must rest with those who would urge that the agency itself has authority to eliminate the doctrine. In my view, nothing in the record contradicts the clear language of section 315(a) which states that licensees have an "obligation imposed upon them under [the Communications Act] to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[3]

Since I believe that the doctrine has been codified, I concur in the decision to defer to Congress on this matter.

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[1] *See* Act of September 14, 1959, Pub. L. No. 86-274, § 1, 73 Stat. 557 (amending 47 U.S.C. § 315(a) (1952)).

[2] *See, e.g., Fairness Report*, 48 F.C.C.2d 1, 1 (1974).

[3] 47 U.S.C. § 315(a) (1984).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of
Syracuse Peace Council
against
Television Station WTVH Syracuse, New York

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 1987; Released August 6, 1987

By the Commission:

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I. INTRODUCTION

1. In *Meredith Corp. v. FCC*,[1] the United States Court of Appeals remanded this case to the Commission for further consideration of our decision, in this adjudication, to enforce the fairness doctrine[2] against station WTVH.[3] The court found that the Commission, on the basis of the evidence of record, had properly concluded that the station failed to satisfy the requirements of the fairness doctrine. It determined, however, that the Commission had acted arbitrarily and capriciously in

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[1]809 F.2d 863 (D.C.Cir.1987).

[2]The fairness doctrine, as developed by the Commission, places a two part obligation upon broadcast licensees. First, broadcasters have an affirmative obligation to cover vitally important controversial issues of interest in their communities. Second, they are obligated to provide a reasonable opportunity for the presentation of contrasting viewpoints on those controversial issues of public importance that are covered. *See, e.g., Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 110-11 (1973); *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 516 (D.C.Cir.), *pet. for reh. en banc denied*, 806 F.2d 111 (D.C.Cir.1986), *cert. denied*, 55 U.S.L.W. 3821 (U.S.1987) (*"TRAC v. FCC"*); *Fairness Report* in Docket No. 19260, 48 FCC 2d 1 (1974), *recon. denied*, 58 FCC 2d 691 (1976), *aff'd sub nom. National Citizens Committee for Broadcasting v. FCC*, 567 F.2d 1095 (D.C.Cir.1977), *cert. denied*, 436 U.S. 926 (1978) (*"1974 Fairness Report"*). The violation at issue in this case involved the second part of the fairness doctrine.

[3]*Syracuse Peace Council v. Television Station WTVH Syracuse, New York*, 99 FCC 2d 1389 (1984), *recon. denied*, FCC 85-571 (released Oct. 30, 1985), *remanded sub nom. Meredith Corp. v. FCC*, 809 F.2d 863 (D.C.Cir.1987) (*"Syracuse Peace Council v. Television Station WTVH"*).

not considering WTVH's contentions that the enforcement of the doctrine deprived the station of its constitutional rights.

2. Pursuant to the court's Order, we reopened this proceeding in order to consider the constitutional and public interest issues raised by WTVH.[4] In light of "the general importance of the issues in this particular case,"[5] we published a notice in the Federal Register inviting comment from interested members of the public as well as from the parties to this adjudication. As explained more fully below, based upon this record, our experience in administering the fairness doctrine, fundamental constitutional principles, and the findings contained in our comprehensive *1985 Fairness Report*,[6] we conclude that the fairness doctrine, on its face, violates the First Amendment and contravenes the public interest. Accordingly, we shall grant reconsideration of our earlier determina-

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[4]Congress has instructed the Commission "to consider alternative means of administration and enforcement of the Fairness Doctrine and to report to the Congress by September 30, 1987." Making Continuing Appropriations for Fiscal year 1987, Pub.L. No. 99-91, Title 5, 407, 100 Stat. 3341-66 (1986). initially assigned Pub.L. No. 99-500, Title 5, 407, 100 Stat. 1983-66) (1986). *See Inquiry Into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees* in MM Docket No. 87-26, FCC 87-67 (released Feb. 19, 1987), 52 Fed.Reg. 7626 (March 12, 1987). In compliance with this congressional directive, we have today adopted a "Report of the Commission" addressing these alternatives ("*Fairness Alternatives Report*").

[5]*Syracuse Peace Council v. Television Station WTVH*, FCC 87-33 (released Jan. 23, 1987), 42 Fed.Reg. 2805-01, at 2 (Jan. 27, 1987) ("*Order Requesting Comment*").

[6]*Inquiry Into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees* in Gen. Docket No. 84-282, 102 FCC 2d 145 (1985), *petition for review docketed sub nom. Radio-Television News Directors Association v. FCC*, No. 85-169] (D.C.Cir. filed Oct. 22, 1985) ("1985 Fairness Report"). The findings contained in that Report are summarized *infra*, at 3-6.

tions in this proceeding, and our previous orders in this proceeding are hereby vacated. Any formal determination that WTVH failed to comply with the requirements of the fairness doctrine can no longer be used against WTVH in any subsequent renewal proceedings or in any other context.[7]

II. BACKGROUND

A. 1985 FAIRNESS REPORT

3. As the Court noted in *Meredith Corp. v. FCC*, the Commission recently conducted "a comprehensive reexamination of the public policy and constitutional implications of the fairness doctrine."[8] During the course of that proceeding, the Com-

[7]As noted above, the court in *Meredith Corp. v. FCC* held that the agency acted unlawfully in enforcing the fairness doctrine without considering whether this action was constitutional. It remanded the case to the Commission to consider the constitutional issues raised by Meredith, or, alternatively, to consider whether enforcement of the doctrine was contrary to public policy. There is no explicit language in the court's decision vacating or reversing the Commission's earlier orders, and consequently we believe that our previous orders determining that WTVH had violated the fairness doctrine and denying reconsideration of that determination remained in effect after the court's decision. We therefore vacate those orders in today's action.

[8]*Meredith v. FCC*, 809 F.2d at 868. *1985 Fairness Report, supra* note 6. Because " 'regulatory agencies do not establish rules of conduct to last forever,' " *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1982), quoting *American Trucking Association, Inc. v. Atchison, Topeka & Santa Fe Railway Co.*, 387 U.S. 397 (1967), the courts have recognized "the need, and indeed the responsibility, of the Commission to reevaluate its regulatory standards over time." *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1425 (D.C.Cir.1983) (footnote omitted). *See Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 411 (D.C.Cir.1983). Cognizant of this responsibility, throughout its history, the Commission has periodically reevaluated the fairness doctrine. *1985 Fairness Report, supra* note 6; *1974 Fairness Report, supra* note 2; *Editorializing by Broadcast Licensees* in Docket No. 8516, 13 FCC 1246 (1949) ("*1949 Fairness Report*"). The *1985 Fairness Report* is both the

mission considered more than one hundred formal comments and reply comments, hundreds of informal submissions, and oral arguments presented in two full days of hearings. The inquiry culminated in the *1985 Fairness Report* released by the Commission on August 23, 1985.[9] Because we believe that the determinations made in the *1985 Fairness Report* are directly relevant to the issues on remand, in this section we shall briefly summarize the major conclusions of that Report before describing the history of this proceeding.

4. Based upon compelling evidence of record, the Commission, in its *1985 Fairness Report*, concluded that the fairness doctrine disserved the public interest. Evaluating the explosive growth in the number and types of information sources available in the marketplace, the Commission found that the public has "access to a multitude of viewpoints without the need or danger of regulatory intervention."[10] The Commission also determined that the fairness doctrine "chills" speech, finding that "in stark contravention of its purpose, [the doctrine] operates as a pervasive and significant impediment to the broadcasting of controversial issues of public importance."[11] In addition, the agency found that its enforcement of the doctrine acts to inhibit the expression of unpopular opinion;[12] it places the government in the intrusive role of scrutinizing program content;[13] it creates the opportunity for abuse for partisan political purposes;[14] and it imposes unnecessary

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most recent and the most comprehensive reassessment of the doctrine conducted by the agency.

[9] *See supra* note 6. The Court of Appeals characterized the conclusions reached by the Commission in the *1985 Fairness Report* as "carefully documented and reasoned . . ." Meredith v. FCC, 809 F.2d at 867.

[10] *1985 Fairness Report*, 102 FCC 2d at 224.

[11] *Id.* at 169.

[12] *Id.* at 188-90.

[13] *Id.* at 190-92.

[14] *Id.* at 192-94.

costs upon both broadcasters and the Commission.[15]

5. While disclaiming any intention to "definitively resolve whether or not the fairness doctrine is constitutional,"[16] the Commission questioned whether the doctrine is consistent with the guarantees of the First Amendment. It stated that "were the balance ours alone to strike, the fairness doctrine would thus fall short of promoting those interests necessary to uphold its constitutionality."[17] The Commission recognized that the Supreme Court in 1969 had upheld the doctrine in *Red Lion Broadcasting Co. v. FCC ("Red Lion")*,[18] but determined that the factual predicates underlying that decision had been eroded.[19]

6. In the *1985 Fairness Report*, the Commission did not reach a definitive conclusion as to whether the doctrine was codi-

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[15]*Id.* at 194-96.

[16]*Id.* at 155.

[17]*Id.* at 156.

[18]395 U.S. 367 (1969). The *Red Lion* decision is discussed more fully *infra*, at 37-38.

[19]The Commission determined that the constitutionality of the fairness doctrine was suspect under the traditional constitutional standard of review governing broadcast regulation enunicated in *Red Lion*. The Commission explained:

> [W]e believe that the fairness doctrine can no longer be justified on the grounds that it is necessary to promote the First Amendment rights of the listening and viewing public. Indeed, the chilling effect on the presentation of controversial issues of public importance resulting from our regulatory policies affirmatively disserves the interest of the public in obtaining access to diverse viewpoints. In addition, we believe that the fairness doctrine, as a regulation which directly affects the content of speech aired over broadcast frequencies, significantly impairs the journalistic freedom of broadcasters.

1985 Fairness Report, 102 FCC 2d at 156.

fied.[20] In light of the "intense Congressional interest in the fairness doctrine ... the pendency of legislative proposals,"[21] as well as the uncertainty as to whether the doctrine was in fact codified, the Commission concluded that "it would be inappropriate at this time ... to either eliminate or significantly restrict the scope of the doctrine."[22] Expressing its intention to continue to enforce the fairness doctrine, the Commission forwarded its Report to Congress so that the legislature would have "an opportunity to review the fairness doctrine in light of the evidence [in that Report]."[23]

B. HISTORY OF THIS PROCEEDING

1. *Syracuse Peace Council v. Television Station WTVH*

7. While the general inquiry on the fairness doctrine was still pending before the agency, the Commission in this adjudication held that television station WTVH in Syracuse, New York, had violated the doctrine.[24] The Commission determined that WTVH, by broadcasting a series of editorial advertisements advocating the construction of the Nine Mile Point II nuclear plant as a sound investment for New York, presented a controversial issue of public importance. Finding at that time that the station had failed to air any contrasting viewpoints on the issue, the Commission concluded that WTVH had not met its obligations under the fairness doctrine.

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[20] *Id.* at 245. In *TRAC v. FCC, supra* note 2—a case decided after the Commission issued the *1985 Fairness Report*—the United States Court of Appeals determined that the fairness doctrine was not codified in Section 315 of the Communications Act. See 47 U.S.C. 315 (1982). The Supreme Court recently denied the petitions for certiorari in that case, 55 U.S.L.W. 3821 (U.S.1987), and consequently the decision in *TRAC v. FCC* is final.

[21] *1985 Fairness Report*, 102 FCC 2d at 247.

[22] *Id.* at 148.

[23] *Id.*

[24] *Syracuse Peace Council v. Television Station WTVH, supra* note 3.

8. The Meredith Corporation, the licensee of station WTVH, petitioned the Commission to reconsider its decision.[25] Addressing the agency's administration of the doctrine, Meredith argued that the Commission had misapplied administrative precedent and had erred in determining that the station violated the fairness doctrine. Specifically, Meredith contended that the Commission had erred in determining that the issue was controversial at the time that the advertisements were broadcast. It also argued that the agency had acted incorrectly in framing the controversial issue of public importance. In addition, it asserted that the agency had improperly distinguished an earlier administrative decision — *Yes to Stop Calloway Committee*[26] — which, in its view, was "controlling" in this case. Finally, providing new evidence of additional programming, Meredith asserted that it had in fact aired balanced programming on the issue involved in this case.

9. In a supplement attached to its Reply,[27] Meredith advanced a number of legal arguments asserting that the fairness doctrine, as applied to the specific facts of the case *sub judice* and on its face, was unconstitutional. First, it contended that the Commission, by failing to follow the appropriate procedures governing the administration of the doctrine, applied the fairness doctrine in a manner which violated its constitutional rights.[28] Second, proferring quantitative data relating to the

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[25]"Petition for Reconsideration," filed by Meredith Corp., *Syracuse Peace Council v. Television Station WTVH* (Jan. 22, 1985).

[26]98 FCC 2d 1317 (1984).

[27]"Reply to Opposition to Petition for Reconsideration and Supplement," filed by Meredith Corp., *Syracuse Peace Council v. Television Station WTVH* (filed Apr. 12, 1985) at 12-19 ("*Meredith Reply*"). That document is attached to the "Comments of Meredith Corp." filed Feb. 25, 1987 in the instant proceeding.

[28]Meredith's first constitutional argument does not question the constitutionality of the fairness doctrine on its face; rather, it is narrowly limited in scope to the effect of the doctrine as applied to the facts of this case.

availability of broadcast stations, cable systems and newer technologies in Syracuse, New York, Meredith asserted that the assumptions of scarcity underlying the Red Lion decision are not present in the specific market in which WTVH operates.[29] Thus, while noting that "there may exist situations today wherein sufficient media outlets do not exist to ensure a multiplicity of both voices and viewpoints,"[30] Meredith asserted that the number and types of information sources in Syracuse, New York, demonstrate that the fairness doctrine is not constitutionally permissible in that market.[31] Third, Meredith stated that "the application of the fairness doctrine to WTVH's editorial decision to air the commercials [in this case] has had a distinct and chilling effect on its freedom of speech."[32] Fourth, Meredith contended that there was sufficient evidence in the Commission's pending fairness doctrine inquiry[33] demonstrating that "the scarcity rationale of *Red Lion* no longer exists"[34] for the agency "to reach the conclusion that, as a general matter, the Fairness Doctrine contravenes the First Amendment rights of broadcasters."[35] Thus, appar-

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This argument apparently relies on the assertion that the agency improperly substituted its determination of the issue addressed in the editorial advertisements for that of the broadcast station instead of assessing whether Meredith had exercised its reasonable judgment in determining the issue addressed.

[29] *Id.* at 26. *See infra* note 88.

[30] *Id.* at 26-27.

[31] *Id.* at 26-31.

[32] *Id.* at 22. *See id.* at 31-33. Meredith stated that the Commission's decision in this case that WTVH violated the fairness doctrine would "work a degree of self-censorship alluded to in *Red Lion*." Id. at 33.

[33] *See Inquiry into the General Fairness Doctrine Obligations of Broadcast Licensees* in Gen.Docket No. 84-282, FCC 84-140 (released May 8, 1984), 48 Fed.Reg. 20,317 (May 14, 1984). The fairness inquiry was pending at the time that Meredith made this argument.

[34] Meredith Reply, at 26 n. 29.

[35] *Id.* In addition, Meredith took the position that the interest of the public in obtaining access to diverse viewpoints can be achieved by less intrusive means than the fairness doctrine. *Id.* at 33-35.

ently questioning the legal and factual basis upon which the constitutionality of the fairness doctrine was upheld in *Red Lion*, Meredith asserted that "the *Fairness Doctrine* as a whole lacks constitutional validity today."[36]

10. In a *Memorandum Opinion and Order*, the Commission denied Meredith's petition for reconsideration.[37] Addressing in detail the nonconstitutional contentions raised by Meredith,[38] the Commission concluded that it had correctly found on the basis of the evidence before it that WTVH had violated the fairness doctrine.[39] The agency, however, did not reach the merits of Meredith's constitutional arguments. Citing the *1985 Fairness Report*, it stated that it had determined to continue to enforce the doctrine "irrespective of [its] view concerning the constitutionality of the Fairness Doctrine, [because] the

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[36]*Id.* at 41. See id. at 19-26. Finally, Meredith argued that the fairness doctrine lacks the requisite specificity required by the due process clause of the Fifth Amendment and thus is unconstitutionally vague. *Id.* at 35-38. *See* U.S. CONST. amend. V. In light of our conclusion that the doctrine deprives broadcasters of their First Amendment rights, we have no need to resolve whether it also violates the due process clause of the Fifth Amendment.

[37]*Reconsideration Order, supra* note 3, at 9.

[38]For example, the Commission determined that it was unreasonable for station WTVH to have concluded that there was no ongoing controversy of public importance on whether the Nine Mile II plant was a sound investment at the time the editorial advertisements were broadcast. *Id.* at 10-16. The Commission rejected Meredith's contention that it had improperly reframed the issue identified by the complainant (*id.* at 16 n. 9), and found Meredith's reliance upon the *Yes to Stop Calloway Committee*, 98 FCC 2d 1317 (1984), to have been misplaced. *Reconsideration Order, supra* note 3, at 17.

[39]The Commission determined, however, that subsequent to the date of its initial ruling, Meredith had provided information that WTVH had in fact broadcast opposing views on this issue. The Commission concluded that this information "demonstrate[d] the licensee's good faith in complying with the Fairness Doctrine and show[ed] its intention to do so in the future." *Reconsideration Order, supra* note 3, at 20.

question of its repeal or its constitutionality is best left to Congress and the courts."[40]

2. *Meredith Corp. v. FCC*

11. Meredith sought judicial review of the Commission's order in the United States Court of Appeals for the District of Columbia Circuit.[41] The Court on review rejected Meredith's contention that the Commission had misconstrued administrative precedent[42] or erred in determining that WTVH's actions did not satisfy the requirements of the fairness doctrine.[43] It asserted, however, that the Commission had acted improperly in holding that Meredith violated the doctrine without responding to the broadcaster's constitutional arguments.[44] While noting that "[a]n agency is not required to reconsider the merits of a rule each time it seeks to apply

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[40]*Id.* at 9 n. 4.

[41]"Petition for Review," filed by Meredith Corp. in *Meredith Corp. v. FCC*, No. 85-1723 (D.C.Cir., filed October 31, 1985).

[42]*Meredith Corp., v. FCC*, 809 F.2d at 870-71. In its opinion, the Court stated that it had "no doubt the Commission's application of its fairness precedent must be sustained. The FCC's opinion thoroughly explained its conclusions and persuasively distinguished the cases cited by [*Meredith*]." *Id.* at 871.

[43]Before reaching the merits of the case, the Court addressed two procedural matters. First, the Court held that Meredith had standing because the Commission had made a formal determination that WTVH had violated the fairness doctrine. *Id.* at 868-69. Second, the Court rejected the argument that Section 405 of the Communications Act, 47 U.S.C. 405 (1982), precluded it from considering the constitutional issues because Meredith had raised these arguments for the first time in a supplemental pleading filed after the deadline for petitions for reconsideration. *Meredith Corp. v. FCC*, 809 F.2d at 869-70.

[44]*Id.* at 872-73. The Court stated that "in a formal adjudication, an administrative agency is obliged to consider and respond to substantial arguments a respondent presents in its defense." *Id.* at 873 (citations omitted).

it,"[45] the court stated that the Commission, in its *1985 Fairness Report*:

> has already largely undermined the legitimacy of its own rule. The FCC has issued a formal report that eviscerates the rationale for its existing regulations. The agency has deliberately cast grave legal doubt on the fairness doctrine ... [in] a formal fashion.[46]

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[45] *Id.*

[46] *Id.* The Court of Appeals concluded that, on remand, ***avoiding the constitutional issue in this case*** "appears clearly no longer available" to the agency. *Meredith Corp. v. FCC*, 809 F.2d at 873 n. 11. The Court pointed out that it had recently determined, in *TRAC v. FCC*, *supra* note 2, that the fairness doctrine was not codified. In addition, the Court discussed the fact that Congress, subsequent to *TRAC v. FCC*, had enacted appropriations legislation which referred explicitly to the fairness doctrine both in the body of that statute and in its legislative history. *Meredith Corp. v. FCC*, 809 F.2d at 873 n. 11. *See* Making Continuing Appropriations for Fiscal Year 1987, *supra* note 4, and H.R.Rep. No. 99-1005, 99th Cong., 2d Sess. 70-71 (1986). The court asserted that the actual language of the appropriations legislation "does not appear to mandate the fairness doctrine." *Meredith Corp. v. FCC*, 809 F.2d at 873 n. 11. The court probed counsel for the Commission, at oral argument, as to whether the Commission could be bound by legislative intent, as expressed in report language and other legislative history, but not in actual legislation. In its decision, the court noted that counsel admitted that legislative history was not legally binding. Despite the fact that the court had before it legislative history indicating that at least some members of Congress did not want the Commission to act on the fairness doctrine, see id., the court nevertheless remanded the proceedings and directed the Commission to consider the constitutional and public interest challenges to the fairness doctrine, demonstrating its determination that the various expressions of congressional intent did not codify the doctrine nor justify continued delay in resolving petitioner's claim. Subsequent to the court's decision in *Meredith Corp. v. FCC*, efforts have been made to codify the fairness doctrine. S. 742, 100th Cong., 1st Sess. (1987); H.R. 1934 (1987). *See* S.Rep. 100-34, 100th Cong., 1st Sess. (1987); H.R.Rep. No. 100-108, 100th Cong. 1st Sess. (1987). S. 742 was passed by the Senate on April 21, 1987, and H.R. 1934 was passed by the House of Representatives on June 3, 1987. The legislation, however, was vetoed by the President on June 19, 1987, 23 Weekly Comp.Pres.Doc. 715 (June 29, 1987), and on June

12. In remanding the case to the Commission for further consideration of Meredith's constitutional claims,[47] the Court provided the Commission with several options. It indicated that the Commission could address the constitutional issue broadly or "choose to decide the issue narrowly, resting on the particular circumstances of Meredith's case."[48] As a further alternative, the Court stated that the Commission could determine, "in an adjudicatory context, that the doctrine cannot be enforced because it is contrary to the public interest and thereby avoid the constitutional issue."[49] In any event, the court admonished the members of this Commission that the failure to consider Meredith's constitutional arguments in its defense was not only the "very paradigm of arbitrary and capricious administrative action," but may also have constituted a breach of the oath that each Commissioner took to support and defend the Constitution.[50] This case was there-

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23, 1987, the Senate voted to return the bill to committee without attempting to override the veto. 133 Cong.Rec. S8438 (daily ed. June 23, 1987). Thus, to date, these efforts have not resulted in codification, and thus the fairness doctrine is not mandated by statute. Hence, this case does not involve the authority of the Commission to question the constitutionality of a statute. Nearly seven months have passed since the Court of Appeals decided *Meredith Corp. v. FCC*, and the Commission has had adequate time to assess comments and to analyze the constitutional and public interest challenges thoroughly. In light of these facts, and in light of the court's clear directions in remanding this case, we believe that we can no longer justifiably delay our response to WTVH's claims. Any further delay in deference to Congress' continuing interest in fairness legislation would be inconsistent with our adjudicatory responsibilities, *Meredith Corp. v. FCC*, 809 F.2d at 873-74, and proper administrative procedure, see *Koniag, Inc. v. Village of Uyak*, 580 F.2d 601 (D.C.Cir.1978); *Pillsbury v. FTC*, 354 F.2d 952 (5th Cir.1966).

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[47] *Id.* at 874.

[48] *Id.* at 872.

[49] *Id.* at 872 n. 10.

[50] *Id.* at 874.

fore remanded for rectification, and we now consider it, in light of that admonition.

3. *Comments on Remand*

13. In view of the importance and potentially far-ranging impact of our decision on remand, we invited interested persons, through publication of a notice in the Federal Register, to submit comments on "whether, in light of the *1985 Fairness Report*, enforcement of the fairness doctrine is constitutional and whether enforcement of the doctrine is contrary to the public interest."[51] On remand, approximately fifty comments were filed by individuals, broadcasters, advertisers, public interest groups, trade associations, governmental entities and others.[52] The comments were approximately equally divided between those who support and those who oppose the fairness doctrine.[53]

14. A number of fairness doctrine advocates argue that the Commission should not consider either the propriety or the constitutionality of the doctrine in this adjudication. For example, certain proponents, including the New York State Con-

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[51]Order Requesting Comment, *supra* note 5, at 2.

[52]A list of the commenting parties is contained in Appendix A.

[53]The American Civil Liberties Union ("ACLU") and the Safe Energy Communication Council ("SECC") each filed a motion requesting the Commission to accept their late-filed comments. "Motion for Leave to File Comments Out-of Time," filed by American Civil Liberties Union, *Syracuse Peace Council against Television Station WTVH* (Mar. 3, 1987); "Motion for Leave to Submit Late-Filed Comments," filed by Safe Energy Communication Council, *Syracuse Peace Council against Television Station WTVH* (Mar. 5, 1987). ACLU stated that it was unable to submit its comments in a timely manner because it was involved in other substantial litigation. SECC asserted that a substantial amount of its draft comments was lost due to a computer malfunction, thereby preventing it from filing its comments within the prescribed deadline. Because both the ACLU and the SECC have shown good cause for the Commission to accept their late-filed comments, we shall grant their motions.

sumer Protection Board ("New York") and the Office of the United Church of Christ *et al.* ("UCC"), argue that the agency lacks the authority to abolish the fairness doctrine in an adjudicatory proceeding because, in their view, it is an agency rule which cannot be altered except through notice and comment rulemaking procedures. The Syracuse Peace Council ("SPC") contends that the agency, on remand, should find, as a factual matter, that Meredith Corporation did not violate the fairness doctrine, and thus the Commission could avoid resolution of any general policy or constitutional issues. In addition, certain commenters suggest alternative proceedings or approaches to the consideration of the issues on remand. For example, a number of parties request the Commission variously to institute a rulemaking on the fairness doctrine, to combine this adjudication with the proceeding addressing alternative enforcement policies for the fairness doctrine, or to defer consideration of this proceeding until after the alternatives proceeding is concluded or until the Supreme Court has disposed of the petitions for certiorari in *TRAC v. FCC.*[54]

15. If the agency decides the case on the merits, some fairness doctrine proponents state that the Commission should limit its consideration to the narrow facts presented in this adjudication. Arguing that the facts of this case are different from the typical fairness doctrine case because, *inter alia*, the controversial issue was presented in the context of an editorial advertisement, SPC and others contend that this adjudication is an inappropriate vehicle for the Commission to undertake a comprehensive evaluation of the doctrine on its face. In ad-

[54]The Democratic National Committee *et al.* ("DNC") urge the Commission to defer resolution of the issues on remand until after the Supreme Court determines whether to grant certiorari in *TRAC v. FCC*. On June 8, 1987, the Supreme Court denied the petition for certiorari in *TRAC v. FCC*, and accordingly that request is now moot. See 55 U.S.L.W. 3821 (U.S.1987).

dition, a number of fairness doctrine proponents assert, as a general matter, that the doctrine is necessary to assure access by the public to diverse viewpoints on controversial issues. On the constitutional issue, they contend that because there are more persons who wish to broadcast than there are frequencies available, the "scarcity rationale" underlying the *Red Lion* decision still exists. Relying upon *Red Lion*, they argue that the fairness doctrine is constitutional.

16. In contrast, many parties opposing the fairness doctrine, including the American Advertising Federation, the National Broadcasting Co., Inc. ("NBC"), and the National Association of Broadcasters ("NAB"), urge the Commission, in this adjudication, to decide expeditiously whether the doctrine furthers the public interest and comports with the First Amendment. Relying upon the findings contained in the *1985 Fairness Report*, the American Association of Advertising Agencies, the Landmark Legal Foundation, the Freedom of Expression Foundation and others note that that there has been a substantial increase in the number and types of information services. They conclude that there is no scarcity of information sources justifying governmental intervention into the content of speech. NBC and others contend that fairness doctrine enforcement requires the government to make decisions concerning the content of programming that are fraught with judgmental uncertainty. Asserting that the effect of the doctrine is to inhibit the expression of views on controversial issues of public importance, a number of commenters state that there is no justification for the doctrine as a matter of policy. In addition, many commenters for the same reasons conclude that the doctrine violates the First Amendment rights of broadcasters. As a consequence, they state that it would be improper for the Commission to continue to enforce the doctrine and urge the agency to take whatever action is necessary to eliminate it.

III. DISCUSSION

A. SCOPE OF THIS PROCEEDING – PROCEDURAL ISSUES

1. Discussion of Policy and Constitutional Issues

17. SPC asserts that the Commission should avoid considering the policy or constitutional issues on remand entirely by resolving this case on the narrow factual issue concerning whether Meredith had violated the fairness doctrine.[55] Specifi-

[55]SPC notes that it had filed an objection to Meredith's Supplement in the reconsideration proceeding. It contends that the agency never considered its procedural objections to the acceptance of Meredith's Supplement in this adjudication. Renewing its request that the Commission strike Meredith's Supplement on procedural grounds, it asserts that the issue as to whether that document should be accepted "is again properly before the Commission." SPC Comments at 10. We disagree. In *Meredith Corp. v. FCC*, the court stated that:

> Clearly ... the Commission had discretion to grant Meredith leave to present its constitutional argument. *And in its opinion on reconsideration, the Commission exercised that discretion, declining to bar Meredith's constitutional argument on procedural grounds—implicitly waiving the timeliness objection.*

809 F.2d at 869 (emphasis added). The court did not question the lawfulness of the agency's waiver. To the contrary, it held that the Commission erred in failing to address the constitutional issues raised by Meredith in its Supplement. An essential and necessary ingredient of this holding is that the arguments contained in the Supplement were properly before the agency. Contrary to SPC's suggestion, we are not free on remand to reconsider the propriety of this waiver. While SPC correctly notes that the court stated that "the Commission within its discretion could have denied Meredith leave to file because of procedural defects" (SPC Comments at 12, quoting *Meredith Corp. v. FCC*, 809 F.2d at 869 n. 6 (emphasis added)), it fails to recognize that the Commission on reconsideration declined to exercise this discretion. We do not believe that there is anything in the court's statement to suggest that the court intended to permit the agency to revisit this issue on remand. In any event, if we were free to consider this issue, we would find that good cause exists to exercise our discretion to accept Meredith's Supplement.

cally, SPC urges us to grant Meredith's Petition for Reconsideration and to vacate our earlier decision upholding the validity of SPC's own complaint on the grounds Meredith had in fact complied with the fairness doctrine by providing responsive programming.[56]

18. We reject SPC's request. The argument that Meredith had in fact satisfied its fairness doctrine obligations by presenting both sides of the controversial issue in question was presented to the court in *Meredith Corp. v. FCC*. Nonetheless, the court expressly affirmed our earlier finding that station WTVH had violated the doctrine.[57] The affirmance of this aspect of the case is final, and we have no power to revisit this determination. It is well-established that:

> [t]he decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority. The latter 'is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of [the] court deciding the case . . .'[58]

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[56]The Court of Appeals, in *Meredith Corp. v. FCC*, held that we erred by failing to consider the constitutional issues raised by Meredith. By arguing that we should avoid consideration of the constitutional issues on remand, SPC, in essence, is asking us to make the same mistake again.

[57]The court specified that "the Commission's application of fairness doctrine precedent must be sustained." *Meredith Corp. v. FCC*, 809 F.2d at 871. SPC, as intervenor in *Meredith Corp. v. FCC*, at that time took the position, in contrast to that which it now takes, that "the FCC correctly applied the fairness doctrine precedent to the facts of this case." Brief of Intervenor Syracuse Peace Council, *Meredith Corp. v. FCC*, (D.C.Cir. No. 85- 1723) at 28 (filed Aug. 19, 1986).

[58]*City of Cleveland, Ohio v. FPC*, 561 F.2d 344, 346 (D.C.Cir.1977), quoting *Yablonski v. United Mine Workers*, 454 F.2d 1036, 1038-39 (D.C.Cir.1971). *See Louisiana Land and Exploration Co. v. FERC*, 788 F.2d 1132, 1137 (5th Cir.1986) *See generally Consumers Union of United States, Inc. v. FTC*, 801 F.2d 417, 421- 22 (D.C.Cir.1986) (Scalia, J.).

"The prior appellate review and determination of [a fairness doctrine violation] ... foreclose the opportunity to redetermine th[at] issue [ ]."[59] SPC would have the Commission on remand revisit issues definitively decided by the Court of Appeals for the apparent purpose of avoiding the policy and constitutional issues which the court specifically directed us to consider. Such an approach would contravene the court's decision in *Meredith Corp. v. FCC*, and we decline to adopt it.[60]

"The basic doctrine that, until reversed the dictates of a Court of Appeals must be adhered to by those subject to the appellate court's jurisdiction applies ... [to the] rule respecting the law of the case. Administrative agencies are no more free to ignore this doctrine than are district courts." *Beverly Enterprises, Inc. v. NLRB*, 727 F.2d 591, 594 (6th Cir.1984) (citations omitted).

[59]*Stewart Warner Corp. v. City of Potomac, Michigan*, 767 F.2d 1563, 1568 (Fed.Cir.1985).

[60]Arguing that the issues in this adjudication and those in the alternatives proceeding (*see supra* note 4) are interrelated, the DNC urges the Commission to consolidate this proceeding with the proceeding addressing fairness doctrine alternatives. It states further that it:

> continue[s] to believe that no modification of the Fairness Doctrine is necessary on either policy or constitutional grounds. If the Commission is committed to proceeding, however, the only viable approach would be for it to make a good-faith effort to explicitly formulate, consider and act upon alternative proposals by expeditiously issuing a Notice of Proposed Rulemaking proposing the adoption of specific alternatives, while simultaneously suspending activities in the Meredith docket.

DNC Comments at 6. We will not adopt DNC's proposal. In *Meredith Corp. v. FCC*, 809 F.2d at 873 n. 11, the court expressly recognized that the agency was under a legislative mandate to consider alternative means of administration and enforcement of the doctrine, but did not suggest that the two proceedings were inextricably interrelated. Nor did the court intimate that the agency should suspend consideration of the issues on remand pending completion of the alternatives proceeding. We note, however, that former Chairman Fowler did tell members of Congress that we would not decide this case on remand before concluding the alternatives report. Rather, he told them, we would decide this case at either the same

19. Therefore, in this *Memorandum Opinion and Order*,[61] we consider whether the fairness doctrine is consistent with

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meeting that we adopt the alternatives report or at a subsequent meeting. *Departments of State, Justice, Commerce, the Judiciary, and Related Agencies for Fiscal Year 1988 Budget Estimates: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 100th Cong., 1st Sess. 642 (1987) (testimony of Chairman Fowler); *see also Departments of Commerce, Juistice, and State, the Judiciary, and Related Agencies Appropriations for 1988; Hearings Before a Subcomm. of House Comm. on Appropriations*, 100th Cong., 1st Sess. 642 (1987) (testimony of Chairman Fowler). As noted above, *supra* note 4, we have complied with that representation by today adopting and submitting the report requested by Congress. We have concluded in that report that it would not further the public interest to institute a rulemaking to consider the promulgation of agency rules on fairness doctrine alternatives. As a consequence, we do not believe that a suspension of this proceeding is warranted. *See infra* note 87. Furthermore, we note that the only issue before us in *this* proceeding is the continued viability of the fairness doctrine *as it is currently administered*. Consideration of this issue does not necessitate any additional evaluation of alternative policies.

[61]Certain parties argue that the Commission lacks authority to conduct this proceeding because the Court of Appeals, in *Meredith Corp. v. FCC*, had not formally issued the mandate remanding the case to the Commission at the time the Commission invited comments on this proceeding. *E.g.*, "Comments of Syracuse Peace Council," filed Feb. 25, 1987, at 3-4 ("SPC Comments"); "Comments of Democratic National Committee *et al.*," filed Feb. 25, 1987, at 2 ("DNC Comments").

We reject this technical argument. The courts have long recognized that the "concept of an indivisible jurisdiction which must be all in one tribunal or all in the other may fit other statutory schemes, but not that of the Communications Act." *Wrather-Alverez Broadcasting v. FCC*, 248 F.2d 646, 649 (D.C.Cir.1957). *See* 47 U.S.C. 405 (1982); *see also United States v. Benmar Transport & Leasing Corp.*, 444 U.S. 4 (1957); *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 541 (1970). Indeed, it is not uncommon for both the Commission and the appellate courts concurrently to exercise jurisdiction over the same proceeding. In *Containerfreight Corp. v. United States*, 752 F.2d 419 (9th Cir.1985), the court rejected an allegation, similar to the one presented in this proceeding, that the Interstate Commerce Commission had improperly reopened a proceeding prior to the issuance of a judicial mandate. Stating that its remand decision "plainly invited the Commission to solicit additional evidence,"

the guarantees of the First Amendment and whether it comports with the public interest. As noted above, the court ordered the Commission to consider Meredith's constitutional arguments unless it decided, on policy grounds, not to enforce the fairness doctrine. As we began to examine the policy issues, however, it became evident to us that the policy and constitutional considerations in this matter are inextricably intertwined and that it would be difficult, if not impossible, to isolate the policy considerations from the constitutional aspects underlying the doctrine.[62] We believe, as a result, that it is

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the court held that the remand proceedings had been "lawfully conducted." *Id.* at 427. The court pointed out that the Commission's action was "simply to get on with the business of complying" with the court's remand decision. *Id.* Similarly, the Order Requesting Comments, "far from being inconsistent with [the Court's] decision in [*Meredith Corp. v. FCC*], was invited by it." *Id.* Similarly, in this case, the only action taken by the Commission before the mandate issued was to invite comments, which was completely consistent with the court's instructions. Further, in subsequent pleadings filed with the court, we informed the court of our Order Requesting Comments, "Opposition to Motion for Stay of Mandate," filed by Federal Communications Comm'n, No. 85-1723 (Feb. 17, 1987), at 2 n. 2, and, having received no indication to the contrary, we have no basis to conclude that our Order Requesting Comments was inappropriately issued.

In any event, on April 10, 1987, the Court of Appeals issued its mandate. As a consequence, the contentions that the Commission lacks jurisdiction to issue any substantive orders prior to the issuance of the mandate are moot.

[62]Our decision to analyze the constitutional and policy issues separately in the *1985 Fairness Report* was out of an abundance of caution not to overstep our appropriate role in this matter. At that time, the uncertainty as to the fairness doctrine's codification, together with Congress' intense interest in the issue, led us to question the propriety of reaching a conclusion on the constitutionality of the doctrine. *See 1985 Fairness Report*, 102 FCC 2d at 155-56. Furthermore, as noted earlier in this proceeding, we believed that the resolution of the constitutional issues was better left to Congress and the courts. *See Reconsideration Order, supra* note 3, at 5 n.4. Consequently, our analysis in the 1985 Fairness Report focused on a policy perspective so as not to run afoul of these concerns. We believe,

appropriate and necessary to address the policy and constitutional issues together for a number of reasons.[63]

20. First, in an analysis of any Commission regulation, it is well-established that First Amendment considerations are an integral component of the public interest standard. For example, in *FCC v. National Citizens Committee for Broadcasting*,[64] the Supreme Court stated that

> the " 'public interest' standard necessarily invites reference to First Amendment principles,' " *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973), and, in particular, to the First Amendment goal of achieving "the widest possible dissemination of information from diverse and antagonistic sources,"

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however, as we reiterate today, that our analysis of the fairness doctrine in 1985 was in fact informed and driven by First Amendment principles, and with the uncertainty of the doctrine's codification removed, *TRAC v. FCC*, *supra* note 2, and the Meredith court's directive to consider the constitutional issues, *Meredith Corp. v. FCC*, *supra* note 1, we believe that it is now incumbent upon us to consider the doctrine in terms of the inextricable constitutional issues on which the policy rests.

[63]Certain parties have continued to argue that the Commission lacks jurisdiction to consider the policy or constitutional implications of the fairness doctrine on the grounds that the doctrine is mandated by statute. As noted *supra*, at note 46, the court in *Meredith Corp. v. FCC*, expressly stated that the Commission could not determine, on remand, that the fairness doctrine is statutory. Indeed, the court pointed out that the argument that the doctrine had been codified by Section 315 of the Communications Act had already been rejected by the court in *TRAC v. FCC*, *supra* note 2. Therefore, in conformance with the court's express directive in *Meredith v. FCC*, we shall not consider the arguments raised by the comments that the doctrine is statutory and, consequently, that the agency lacks jurisdiction to question either its propriety or its constitutionality.

[64]436 U.S. 775 (1978).

Associated Press v. United States, 326 U.S. 1, 20 (1945).[65]

A meaningful assessment of the propriety of the doctrine, therefore, necessarily includes an evaluation of its constitutionality. If the doctrine impedes the realization of First Amendment objectives—and, as explained more fully below, we believe that it does—*a fortiori* it disserves the public interest.

21. A second, but related, reason that the policy and constitutional issues are inextricably intertwined is that the promotion of First Amendment values was the Commission's core policy objective in establishing and maintaining the doctrine.[66] The parameters defining the need and desirability of government intervention under the fairness doctrine are coextensive with those of the First Amendment. Therefore, if the doctrine fails to further First Amendment principles, or if it strays from those parameters established by the Constitution, it necessarily follows that the doctrine does not achieve the specific purpose for which it was intended and can no longer be sustained.[67]

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[65]436 U.S. at 775. *See also American Security Council Education Foundation v. FCC*, 607 F.2d 438, 443 n. 12 (D.C.Cir.1979), *cert. denied*, 444 U.S. 1013 (1980).

[66]In our *1974 Fairness Report*, we asserted that there was a symmetry of purpose between the fairness doctrine and the First Amendment:

> The purpose and foundation of the fairness doctrine is ... that of the First Amendment itself: "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail..."

48 FCC 2d at 6, quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 390. *See also 1949 Fairness Report*, 13 FCC at 262-63.

[67]Conversely, as we noted in the *1985 Fairness Report*, "the same factors which demonstrate that the fairness doctrine is no longer appropriate as a matter of policy also suggest that the doctrine may no longer be permissible as a matter of constitutional law." 102 FCC 2d at 147-48.

22. Third, this Commission was established by Congress as the expert agency in broadcast matters and possesses more than fifty years of experience with the day-to-day implementation of communications regulation. As a consequence, the courts, when considering the constitutionality of broadcast regulation, have found our perspective informative. For example, the Supreme Court has stated that "in evaluating ... First Amendment claims ... we must afford great weight to the decisions of Congress and the experience of the Commission. . . ."[68] Further, the Court of Appeals, in remanding this case to the Commission, affirmatively stated that it "may well benefit—in the event of further review—from the Commission's analysis [of the constitutional issue]."[69] Accordingly, we consider the constitutional and policy issues raised in this proceeding as being derived from the same set of principles.

23. We reject the contention of those parties who argue that we cannot address the broad policy and constitutional issues involving the fairness doctrine in this proceeding, but must issue an additional rulemaking notice to do so.[70] In *Meredith Corp. v. FCC*, the Court explicitly stated that the Commission could decide this case on broad policy and constitutional grounds.[71] The contention, then, that the Commission lacks authority to consider these issues in this adjudication is directly

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[68]*Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 102. *See FCC v. League of Women Voters of California*, 468 U.S. 364, 376 n. 11 (1984).

[69]*Meredith Corp. v. FCC*, 809 F.2d at 872.

[70]*E.g.*, "Comments of Office of Communication of the United Church of Christ, Communication Commission, National Council of Churches, Henry Geller and Donna Lampert" at 2-4 (Feb. 12, 1987) ("UCC Comments"); "Comments of the New York State Consumer Protection Board" at 2-4 (Feb. 24, 1987) ("New York Comments"); "Comments of the American Civil Liberties Union" at 2 n. 1 (March 2, 1987) ("ACLU Comments").

[71]*Meredith Corp. v. FCC*, 809 F.2d at 872.

at odds with the directive of the Court of Appeals in remanding this case to the agency.

24. It is well-established, moreover, that "administrative agencies have wide leeway in choosing to announce rules and intepretations in the course of adjudications."[72] The courts have duly recognized that "the choice whether to proceed by rulemaking or adjudication is primarily one for the agency regardless of whether the decision may affect agency policy and have general prospective application."[73] While acknowledging this long established rule of administrative law,[74] certain parties nonetheless contend that the Commission's discretion in selecting the type of proceeding in which to consider its policies would be abused were the Commission to address the broad constitutional and policy issues in this adjudication.[75] We disagree. Even if this case only involved a

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[72]*International Union, United Automobile, Aereospace & Agricultural Implement Workers of America v. Brock*, 783 F.2d 237, 246 (D.C.Cir.1986). Indeed, the Supreme Court has stated that an administrative agency "is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). *See SEC v. Chenery*, 332 U.S. 194, 203 (1947), quoting *Columbia Broadcasting System v. United States*, 316 U.S. 407, 421 (1942) ("And the choice made between proceeding by general rule or by individual ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.").

[73]*Chisholm v. FCC*, 538 F.2d 349, 365 (D.C.Cir.), *cert. denied*, 429 U.S. 890 (1976) (FCC had discretion in reversing an administrative interpretation involving the "equal time" provisions of Section 315 of the Communications Act by adjudication).

[74]*See, e.g.*, ACLU Comments at 2, n. 1.; SPC Comments at 17-18.

[75]Because this adjudication does not involve certain issues which are present in some fairness doctrine cases, *e.g.*, noncommercial programming, the first prong of the doctrine, ballot questions, election-related issues, the political editorial rules or the personal attack rules, SPC contends that it would be an abuse of our discretion to address the general policy and constitutional issues in this adjudication. *See* SPC Comments at 17. To

situation in which the agency decided on its own motion to reevaluate in an adjudication the propriety and the constitutionality of the fairness doctrine, this course of action would be lawful. The courts permit the Commission to reassess administrative precedent in adjudications even where the regulatory policy is of long standing and has far reaching effect.[76] In any event, the agency reopened this proceeding pursuant to an express judicial directive to consider the lawfulness of enforcing the fairness doctrine against station WTVH, provided explicit notice of the matters at issue, and solicited comment from all interested parties. It can hardly be an abuse of discretion for an agency to comply with an order of the Court of Appeals by addressing on remand the precise issues contemplated by that court.

25. We also reject the contention that we are barred from considering the propriety of the fairness doctrine because it is an agency rule which can not be modified or eliminated except through the notice and comment procedures prescribed in Section 4 of the Administrative Procedure Act ("APA").[77] The fairness doctrine was never promulgated as an agency regulation pursuant to a notice and comment rulemaking process. Rather, it was developed over a period of time[78] through statements of policy (without notice and comment) and case-by-case adjudications. The first fairness doctrine obligations

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the extent that SPC challenges our ability to review the parent fairness doctrine in this adjudication involving its application in a particular context, we do not accept this argument. *See supra* 27-35. Because this decision will serve as precedent in future cases, we need not — and do not — decide here what effect today's ruling will have on every conceivable application of the fairness doctrine.

[76] *Chisholm v. FCC*, 538 F.2d at 364-65.

[77] 5 U.S.C. 553 (1982).

[78] As we stated in the *1985 Fairness Report*, "the genesis of the fairness doctrine reveals an evolutionary process, spanning over a considerable period of time." *1985 Fairness Report*, 102 FCC 2d at 146.

were imposed by the FCC and its predecessor, the Federal Radio Commission, in early adjudicatory proceedings.[79] The policy was clarified and further developed in subsequent adjudications and in reports issued by the Commission in 1949 and 1974.[80] The fairness doctrine was established, without notice and comment, and there is no requirement that it now be modified or eliminated through notice and comment rulemaking.[81]

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[79]*E.g., Great Lakes Broadcasting Co.*, 3 FRC 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C.Cir.), *cert. dismissed*, 281 U.S. 706 (1930); *Young People's Association for the Propagation of the Gospel*, 6 FCC 178 (1938); *Mayflower Broadcasting Corp.*, 8 FCC 333 (1941).

[80]*1949 Fairness Report, supra* note 8; *1974 Fairness Report, supra* note 2. For a history of the fairness doctrine, see Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General *Fairness Doctrine Obligations of Broadcast Licenses* in Gen. Docket No. 84-292 (Notice of Inquiry FCC 84-282 (released May 8, 1984); 49 Fed. Reg. 20,317 (May 14, 1984) at 9-24

[81]We note, however, that, in any event, we opened the record in this very proceeding to accept comments from interested persons (whether or not parties to the proceeding) as to the appropriate course of action for us to take following the *Meredith Corp. v. FCC* decision. Order Requesting Comment, *supra* note 5. We believe that, in light of the Order Requesting Comment, the *1985 Fairness Report* (the culmination of a proceeding in which interested persons had ample opportunity to participate, *see supra* 3), and the *Meredith* case itself, interested persons had adequate notice and opportunity to comment on a proceeding that would obviously consider, and possibly rule on, the constitutionality of the fairness doctrine even if notice and comment were required. Indeed, a substantial number of commenters in this proceeding addressed the constitutional issues raised by this case. We see little difference between a Section 553 notice and comment rulemaking and the procedures followed in this adjudication. Therefore, even were notice and comment rulemaking procedures prescribed by the APA, this proceedingis comparable to the situation in *Chisholm v. FCC*, in which the Court of Appeals stated that it:

> see[s] no advantage to be gained in this instance by requiring the Commission to proceed via the formalities of rulemaking rather than through adjudication. Petitioners ... all submitted lengthy comments to the Commission .... [T]he issues were fully aired before the Commission, which had the benefit of all

26. Contrary to the contentions of parties such as the Office of Communications of the United Church of Christ, the fact that the fairness doctrine is referred to in Section 73.1910 of our rules[82] does not mean that it can be altered or eliminated only by means of a notice and comment rulemaking. The reference to the fairness doctrine was incorporated in the Code of Federal Regulations in 1978.[83] The Commission, without extensive analysis, had concluded at that time that the doctrine was codified by Section 315 of the Communications Act. Section 73.1910, which was adopted without notice and comment as part of an omnibus procedural restructuring of the broadcast rules, is a simple statement setting forth what the Commission erroneously perceived to be required by Section 315.[84] Specifically, in adopting Section 73.1910, the Commission stated that:

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arguments raised before this court. It is therefore difficult to see how requiring the Commission to go through the motions of notice and comment rulemaking at this point would in any way improve the quality of the information available to the Commission or change its decision. The only result would be delay while the Commission accomplished the same objective under a different label. Such empty formality is not required where the record demonstrates that the agency in fact has had the benefit of petitioners' comments. 538 F.2d at 365.

[82]47 C.F.R. 73.1910 (1986).

[83]*Reregulation of Radio and Television Broadcasting*, FCC 78-681 (released Oct. 16, 1978), 43 Fed.Reg. 45,842 (Oct. 4, 1978).

[84]In its entirety, Section 73.1910 states that:

> The Fairness Doctrine is contained in section 315 of the Communications Act of 1934, as amended, which provides that broadcasters have certain obligations to afford reasonable opportunity for the discussion of conflicting views on issues of public importance. See FCC public notice "Fairness Doctrine and the Public Interest Standards," 39 FR 26372. Copies may be obtained from the FCC upon request. § 47 C.F.R. 73.1910 (1986).

> The new rule simply states that the Fairness Doctrine is in Section 315(a) of the Communications Act, directs the rule user to the FCC public notice, "Fairness Doctrine and the Public Interest Standard," ... and includes information on obtaining copies of this document from the FCC.[85]

Its adoption did not effectuate any change in broadcasters' obligations under the fairness doctrine. The Court of Appeals decision in *TRAC v. FCC* that the fairness doctrine is not codified in Section 315 renders Section 73.1910 of our rules meaningless, and it consequently has no relevance to the issues addressed in this proceeding.

2. Consideration of the Doctrine on its Face

27. After reviewing Meredith's several arguments in its defense,[86] we are persuaded by its argument that the fairness doctrine is unconstitutional on its face. We, therefore, do not—and, as explained below, cannot—confine our determination of the issues involved here to the specific facts of this adjudication. We do not believe that the constitutionality or the propriety of our holding that WTVH violated the fairness doctrine turns narrowly upon either the specific manner in which we have enforced the doctrine in this instance[87] or upon

[85] *Reregulation of Radio and Television Broadcasting*, 43 Fed.Reg. at 45,843.

[86] *See supra* 9.

[87] Although Meredith challenged the constitutionality of the doctrine on its face, it alternatively asserted that the method in which we administered the doctrine in this case was unconstitutional. *See supra* 9. For two reasons, the constitutional determination herein shall not rest upon a narrow, "as applied" basis. First, Meredith's argument is premised upon the alleged failure of the Commission to follow the established procedures governing the enforcement of the fairness doctrine. Both the Commission on reconsideration and the Court of Appeals on review have already squarely rejected that argument. Second, we believe that the infringement on broadcasters' constitutional rights resulting from the application

any unique circumstances in the particular geographic market in which we have applied it.[88] Rather, we believe, as more fully discussed below, that the doctrine's infirmity of imper-

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of the doctrine cannot be cured simply by a purportedly less intrusive enforcement mechanism. As we stated in the *1985 Fairness Report:*

> [W]e have enforced the doctrine with a view toward minimizing editorial intrusion on broadcast journalists. But the record in this proceeding has convinced us that the fairness doctrine generally operates to inhibit the presentation of controversial issues of public importance on the airwaves. Because the inhibiting effect is an inevitable result of the substantive rule itself, even carefully crafted implementing mechanisms have not been successful in preventing the fairness doctrine from operating to deter broadcasters from airing important and controversial issues.

102 FCC 2d at 184 (footnote omitted). In the *Fairness Alternatives Report, supra* note 4, we evaluated a number of proposals concerning alternative means of enforcing the fairness doctrine. In that *Report*, we reaffirmed our earlier determination that less intrusive enforcement of the existing fairness doctrine would not eliminate the "chilling effect" of the fairness doctrine, but determined that certain alternatives to the fairness doctrine were nevertheless preferable to the existing doctrine. *See supra* note 60.

[88]In its Reply, Meredith described the multiplicity of information sources available to listeners and viewers in Syracuse, New York. Although we believe, as discussed below, that the explosive growth in the number and types of information sources available to the public in the years since the Supreme Court's decision in *Red Lion* reinforces that the doctrine is unconstitutional, *see infra* 55-57, we believe that this is a factor, present in all markets, that makes the doctrine unconstitutional as a general matter. Further, neither this growth nor the actual number and types of information sources themselves have a bearing on the unconstitutional chilling effect that we have identified from the enforcement of the doctrine. Our concern for this chilling effect crosses all geographic and economic markets—from the largest to the smallest. Indeed, our concern is especially compelling in the smaller markets, where a chill would seriously deprive the public in those markets of access to robust, uninhibited debates on issues of public importance. The fact that the fairness doctrine is unconstitutional because it chills speech cannot change based on the size of the market in which the chill occurs. Therefore, we see no reason to limit our decision to the enforcement of the fairness doctrine in particular markets.

missibly chilling and reducing the discussion of controversial issues of public importance is not an infirmity resulting from the enforcement of the doctrine in this particular case or in particular markets, but is an infirmity that goes to the very heart of the enforcement of the fairness doctrine as a general matter. We believe that the relevant issue in this proceeding is whether the doctrine itself complies with the strictures of the First Amendment and thereby comports with sound public policy. Therefore, in order to resolve the issues that the Court directed us to consider, we conclude that we have no choice but to consider Meredith's challenge to the facial validity of the fairness doctrine itself.[89]

28. We also believe that there are cogent reasons why we must consider the broad policy and constitutional issues in this adjudication.[90] The particular broadcast at issue in this adjudication involved the broadcast of an editorial advertisement,[91]

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[89]In remanding the case to the Commission for consideration of the constitutional issue, the court, in *Meredith Corp. v. FCC*, had left it to the Commission to determine whether the constitutional issue could be dealt with "narrowly, resting on the particular circumstances of Meredith's case," or whether it ought to be dealt with "more broadly." 809 F.2d at 872.

[90]As the Court in *Meredith Corp. v. FCC* noted, the *1985 Fairness Report* casts doubt upon the continued lawfulness of the fairness doctrine. 809 F.2d at 873. By resolving the issues in this proceeding broadly, we will remove the uncertainty that currently exists concerning the propriety and the constitutionality of the doctrine.

[91]The purpose of editorial advertising—like the advertisement in *New York Time s v. Sullivan*, 376 U.S. 476 (1957)—is to disseminate opinions on important public issues rather than to carry out commercial transactions. Therefore, in its objective, editorial advertising is identical to the other types of broadcast speech on important, controversial issues that implicate the fairness doctrine. It is, in essence, political speech and not merely commercial speech, thereby deserving of the protections accorded to the former and not the latter category of speech under the First Amendment. *Compare id.; Consolidated Edison v. Public Service Comm'n*, 447 U.S. 530 (1980) (political speech); with *Central Hudson Gas v. Public Service Comm'n*, 447 U.S. 557 (1980) (commercial speech); *Virginia Phar-*

which triggered our enforcement of the fairness doctrine as expressed more particularly through the Cullman doctrine.[92] Although, at first blush, it appears that our decision could be limited to such announcements and to the continued vitality of the Cullman doctrine, closer scrutiny reveals that the policies involved cannot be segregated on any principled basis, so that such an approach is untenable.

29. The Cullman doctrine developed from a particular application of the fairness doctrine in *Cullman Broadcasting Co.*[93] The *Cullman* case clarified that the fairness doctrine applies to a broadcaster's airing of an editorial advertisement that presents for the first time one side of a controversial issue of public importance, thereby requiring the broadcaster to afford a reasonable presentation of contrasting viewpoints on that issue. Under the *Cullman* doctrine, if a broadcaster does not intend to present contrasting viewpoints through its own programming and cannot obtain paid sponsorship for the presentation of such viewpoints, then it cannot refuse to broadcast a presentation of those viewpoints (otherwise suitable to the licensee) on the ground that it cannot obtain paid sponsorship for that presentation.[94] The Cullman doctrine is, in

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macy Board v. Virginia Consumer Council, 425 U.S. 748 (1976) (commercial speech).

We note that the type of editorial advertisement at issue in this and other Cullman doctrine proceedings should be distinguished from paid political advertisements, the broadcast of which would constitute a "use" within the meaning of 37 U.S.C. §§ 312(a)(7) and 315 and thereby trigger the particular obligations enumerated in the statute. Our decision herein focuses only on the group of obligations that comprise the fairness doctrine, which are separate and distinct from the obligations imposed by 47 U.S.C. §§312(a)(7) & 315. The latter obligations are thus not at issue in this proceeding.

[92] *Cullman Broadcasting Co.*, 25 RR 895 (1963).

[93] 25 RR 895 (1963).

[94] *Id.* at 897.

reality, no more than a statement that the fairness doctrine must be complied with regardless of the availability of paying program sponsors,[95] and, as explained more fully below, its infirmity stems from the very heart of the fairness doctrine—*i.e.*, its threat of government intrusion into the editorial process to ensure that broadcasters provide balanced programming in connection with their airing of editorial advertisements inhibits broadcasters from accepting such advertisements.[96] Thus, the *Cullman* doctrine can neither be logically nor materially distinguished from the core of the fairness doctrine itself.

30. For example, the fact that the *Cullman* doctrine requires the broadcaster to broadcast unsponsored presentations of contrasting viewpoints if it cannot obtain sponsored presentations of such viewpoints does not distinguish it from its parent

[95]Indeed, in the *Cullman* case itself, the Commission considered its holding to be an application of the fairness doctrine when it said: "We hope that the views set forth above will be helpful in determining the requirements of the 'fairness doctrine' with respect to controversial issues such as this one." *Id.* at 897. We also note that, in the Red Lion decision, the Supreme Court cited to the *Cullman* doctrine as only one element of a collection of principles that comprise the fairness doctrine. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 377-78.

The *Cullman* doctrine has been criticized on the grounds that it requires broadcasters to present balanced programming as a result of issues and viewpoints presented through advertisements. Such advertisements, according to critics, are not properly considered part of broadcasters' programming, since they are prepared by individual private interests and are not the product of broadcasters' editorial discretion. Additionally, critics argue that broadcasters should be held responsible under the fairness doctrine only for the programming that they produce. Although these arguments identify problems associated with the enforcement of the *Cullman* doctrine, they do not serve to distinguish the *Cullman* doctrine from the fairness doctrine. Rather, *Cullman* is consistent with the fairness doctrine's focus on broadcasters' overall programming and the exercise of their discretion in accepting editorial advertisements as part of their overall programming. As such, it is properly viewed as the product of the fairness doctrine itself.

[96]*See infra* 48.

fairness doctrine. The presentation of one side of any controversial issue of public importance is generally financed either directly by the actual speaker, through an editorial advertisement (a *Cullman* scenario), or by the broadcaster, through the station's commercial advertisement revenues (a general fairness scenario). If the broadcaster cannot obtain financing for the presentation of contrasting viewpoints on a particular issue from the sale of another editorial advertisement to another speaker, then the broadcaster must finance the presentation of such viewpoints using its own commercial advertisement revenues. In either event, the regulatory and economic burdens on the broadcaster are the same; and nothing distinguishes the *Cullman* doctrine from the fairness doctrine in this context.[97]

[97]We note that the enforcement of the *Cullman* doctrine, in practice, results in the misimpression by many broadcasters that the doctrine requires them to counter paid editorial advertisements with unpaid advertisements if they are unable to obtain paid advertisements to present opposing viewpoints. Although the doctrine only requires broadcasters to present such viewpoints in their overall programming, many broadcasters may believe that it is easier to defend themselves against potential fairness doctrine complaints by demonstrating that they presented opposing viewpoints through other editorial advertisements. Indeed, the record developed in the *1985 Fairness Report* indicates that, in some instances, the advocates of those opposing viewpoints perpetuate this misimpression by insisting that broadcasters air opposing viewpoints through such advertisements, threatening to complain to the Commission if broadcasters fail to do so. *See 1985 Fairness Report*, 102 FCC 2d at 174-78 (specifically citing the effect of the *Cullman* doctrine on the coverage of such public issues as beverage deposit legislation and smoking legislation).

In other contexts, the Supreme Court has specifically rejected as contrary to the First Amendment the proposition that government may regulate speech for the purpose of equalizing the voices of those with differing financial resources. *Buckley v. Valeo*, 424 U.S. 1, 49 (1974). This, however, has been the practical effect of the policy here in question, as is well illustrated by the facts of this case. To respond to the paid spot advertisements of the Energy Association of New York, WTVH provided the Environmental Defense Fund and the *Syracuse Peace Council* with 103 free spots to provide contrasting views. *Reconsideration Order*, *supra* note 3, at 19.

31. Finally, *Cullman* obligations arise, just as general fairness obligations arise, only when the editorial advertisement involves a controversial issue of public importance. Hence, just like other programming that does not involve such issues, an editorial advertisement that does not involve a controversial issue of public importance does not give rise to any obligation to present contrasting viewpoints. Consequently, it becomes clear that the *Cullman* doctrine derives its life blood from the fairness doctrine, and its continued vitality cannot be considered without a concomitant assessment of the underlying fairness doctrine. Therefore, we believe that, because the constitutional and public interest infirmity of the *Cullman* doctrine derives from the underlying fairness doctrine, it would be arbitrary and capricious for us to consider the *Cullman* doctrine in this proceeding, without also addressing the fairness doctrine that stands as its base.

32. In short, broadcasters are faced daily with editorial decisions concerning what types of commercial or noncommercial material on controversial public issues to present to their listeners and viewers. The fundamental issue embodied in this fairness doctrine litigation is the same as that presented in all other fairness doctrine cases: whether it is constitutional and thereby sound public policy for a government agency to oversee editorial decisions of broadcast journalists concerning the broadcast of controversial issues of public importance. Because the case before us is a ***product of the fairness doctrine*** itself, and because it raises important policy and constitutional issues common to all fairness doctrine litigation, we do not believe that the resolution of this proceeding turns on any specific facts that are unique to this adjudication.

33. Nor do we believe that it would be appropriate, in passing on the constitutional and policy issues raised by our enforcement of the fairness doctrine, to limit our consideration of such issues to the one part of the fairness doctrine that we

determined had been violated in this case. The fairness doctrine, although consisting of two parts,[98] is a unified doctrine; without both parts, the doctrine loses its identity. The litigants and courts in this and, indeed, the *Red Lion* case have all considered the validity of the doctrine as a whole, and not as two separate policies. They have considered the doctrine as such because neither part of the doctrine, standing separately, constitutes the fairness doctrine, for both parts of the doctrine are interdependent and integral to the overall regulatory scheme.[99] Consequently, if the constitutional infirmity of the doctrine arises from the enforcement of one of its parts, we do not believe it appropriate to sever that part of the doctrine and to continue enforcing only the other part.[100]

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[98]*See supra* note 2.

[99]In 1949, the Commission attempted to articulate in a single concept what had previously been a generic notion of "fairness": "the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community by the particular station." *1949 Fairness Report*, 13 FCC at 1249. By developing the fairness doctrine, then, the Commission sought to impose two obligations with respect to the coverage of controversial issues and the presentation of contrasting viewpoints in order to fulfill one policy goal. The doctrine, for example, would not, by its own terms, achieve its purpose if it only required broadcasters to cover controversial issues of vital importance to their communities (the first part), for it would not also ensure that contrasting viewpoints on those issues would also be covered. Conversely, simply requiring broadcasters, when covering controversial issues of public importance, to provide reasonable coverage of contrasting viewpoints (the second part) would not achieve the purpose of the doctrine, because broadcasters could avoid this obligation altogether by simply refusing to cover controversial issues of public importance. Because each part of the doctrine gives life to the other, we find the two parts to be inextricably linked to constitute what is currently known as the fairness doctrine.

[100]When considering this issue in the context of statutes, courts look to the overall statutory scheme in determining whether the constitutionally infirm portion of the statute may be severed from the remaining portion. If the infirm portion is integral to the overall scheme, then the entire statute must fall, regardless of whether the rest of the statute, taken separately,

34. Yet even if we were to sever the two prongs of the doctrine and consider and invalidate only that prong which was violated in this case, we would be left with something very different from the fairness doctrine. The first part of the fairness doctrine, by itself, although subject to a different regulatory focus and enforcement mechanism, may be compared to the already existing obligation of broadcasters to cover issues of importance to their communities.[101] Accordingly, retaining both obligations would be duplicative. There is thus no need to sever the two parts of the existing fairness doctrine in order to retain the obligation imposed by the first part.

35. In remanding this case to us, the Court of Appeals did not indicate that we were obligated to consider, or even that we should consider, the two parts of the doctrine separately, and, as stated above, we do not believe that we are otherwise obligated to do so. Our directive from the court was to

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would still be constitutional. *Compare EEOC v. Allstate Ins. Co.*, 570 F.Supp. 1224 (S.D.Miss.1983), *appeal dism'd*, 467 U.S. 1232 (1984) (legislative veto not severable from statutory scheme), with *INS v. Chadha*, 462 U.S. 919 (1983) (legislative veto severable from statutory scheme). Similarly, we believe that if our enforcement of the second prong of the fairness doctrine against *Meredith* was unconstitutional, then the entire doctrine must fall, for the second prong, as stated above, is integral to the overall regulatory scheme and cannot, therefore, be severed.

[101] *See Report and Order* in MM Docket No. 83-670, 98 FCC 2d 1076, 1091-92 (1984), *recon. denied*, 104 FCC 2d 358 (1986), *remanded on other grounds sub nom., Action for Children's Television v. FCC*, No. 86-1425 (D.C.Cir. June 26, 1987) ["*Television Deregulation*"]; *Report and Order* in BC Docket No. 79-219, 84 FCC 2d 968, 977 (1981), *recon. denied*, 87 FCC 2d 797 (1981), *rev'd on other grounds sub nom., Office of Communications of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C.Cir.1983) ["*Radio Deregulation*"]. We note that, because such obligations are different and do not lie within the fairness doctrine, they are not at issue in this proceeding.

consider the constitutionality and propriety of the fairness doctrine as it is currently administered. That doctrine, both on its face and as administered, contains two parts that, together, constitute the fairness doctrine. Accordingly, we consider the entire doctrine in this proceeding and decline to sever its parts from one another.

B. CONSTITUTIONAL CONSIDERATIONS UNDER RED LION

36. As more fully discussed below, the extraordinary technological advances that have been made in the electronic media since the 1969 *Red Lion* decision, together with a consideration of fundamental First Amendment principles, provide an ample basis for the Supreme Court to reconsider the premise or approach of its decision in *Red Lion*. Nevertheless, while we believe that the Court, after reexamining the issue, may well be persuaded that the transformation in the communications marketplace justifies alteration of the *Red Lion* approach to broadcast regulation,[102] we recognize that to date the court has determined that governmental regulation of broadcast speech is subject to a standard of review under the First Amendment that is more lenient than the standard generally applicable to the print media.[103] Until the Supreme

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[102] *1985 Fairness Report*, 102 FCC 2d at 155.

[103] *E.g., FCC v. League of Women Voters of California*, 468 U.S. at 377. *See Red Lion Broadcasting Co. v. FCC*, *supra* n. 18. Indeed, in criticizing the scarcity rationale employed by the Supreme Court in *Red Lion*, Judge Bork, in *TRAC v. FCC*, noted that until the Court revisits *Red Lion*, "neither [the Court of Appeals] nor the Commission is free to seek new rationales to remedy the inadequacy of the doctrine in this area." TRAC v. FCC, 801 F.2d at 509; *see also Branch v. FCC*, No. 86-1256, *slip op.* at 25-26 (D.C.Cir. July 21, 1987) ("But unless the Court itself were to overrule *Red Lion*, we remain bound by it.").

Court reevaluates that determination, therefore, we shall evaluate the constitutionality of the fairness doctrine under the standard enunciated in Red Lion and its progeny.[104]

1. *Red Lion Broadcasting Co. v. FCC*

37. Eighteen years ago, the Supreme Court, in *Red Lion Broadcasting Co. v. FCC*, upheld the constitutionality of the fairness doctrine because it believed, at that time, that the doctrine promoted "the paramount [F]irst [A]mendment rights of viewers and listeners to receive 'suitable access to ... ideas and experiences.' "[105] In that decision, the Court clearly articulated a First Amendment standard for evaluating broadcast regulation which provided less protection to the speech of broadcast journalists than that accorded to journalists in other media. The Court held that, "[i]n view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without government assistance to gain access to those fre-

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[104]Some commenters, however, contend that the fact that the Supreme Court in *Red Lion* determined that the fairness doctrine was constitutional almost two decades ago mandates a finding by this Commission that the doctrine is constitutional today. We disagree. If this were so, the Court of Appeals would not have remanded this case for us to consider Meredith's constitutional arguments, because our initial failure to consider them would not have been reversible error. Indeed, for the reasons set forth below, we believe the rationale employed by the Court in *Red Lion* compels the conclusion that the fairness doctrine contravenes the First Amendment today, when evaluated consistent with the principles of *Red Lion*. Furthermore, the relationship between the application of constitutional principles in this area and the advances in technology are such, as the Supreme Court has indicated, that it is necessary to review past decisions to ensure their consistency with current technology. *See infra* 66-72.

[105]*American Security Council Education Foundation v. FCC*, 607 F.2d 438, 443-44 (D.C.Cir.1979), *cert. denied*, 444 U.S. 1013 (1980), quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 389-90.

quencies for expression of their views,"[106] the government could require persons who were granted a license to operate "as a proxy or fiduciary with obligations to present those views and voices which are representative of his community."[107] The Court thus described what it subsequently characterized as "an unusual order of First Amendment values;"[108] it determined that governmental restrictions on the speech of broadcasters could be justified if they furthered the interests of listeners and viewers.

38. Although the Court in Red Lion articulated this standard for broadcast regulation, in several respects its holding was narrow in scope. First, the Court, in explicit terms, disclaimed an intention of "approv[ing] every aspect of the fairness doctrine."[109] Second, as the Court in *Meredith v. FCC* noted, the *Red Lion* decision "was expressly premised on the scarcity of broadcast frequencies 'in the present state of com-

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[106] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 395. The Court stated that "because the frequencies reserved for public broadcasting were limited in number, it was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few." *Id.* at 388. We discuss the significance of this rationale more fully below. *See infra* 75-80. Although the Court's decision in *Red Lion* admittedly focused on the concept of spectrum or allocational scarcity—the fact that there were more individuals who wanted to broadcast than there were broadcast frequencies to award—the Court has also been concerned about the actual number of information outlets available in the electronic press. *See League of Women Voters of California v. FCC*, 468 U.S. at 376 n. 11. To the extent that the Court is concerned about numerical scarcity in this medium, we believe, as more fully discussed below, that with the explosive growth in the number of electronic media outlets in the 18 years since *Red Lion*, there is no longer a basis for this concern. *See infra* 67-71 & 74.

[107] *Id.* at 389.

[108] *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 101 (1983).

[109] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 396.

mercially available technology' as of 1969."[110] Third, and most importantly, the Court, in determining that the doctrine satisfied the requirements of the First Amendment, relied upon the Commission's express representation that there was no evidence that the doctrine "chills speech." The Court emphasized that if the fairness doctrine were found to inhibit broadcasters from covering controversial issues of public importance:

> Such a result would indeed be a serious matter for ... the purposes of the doctrine would be stifled. At this point, however, as the Federal Communications Commission has indicated, that possibility is at best speculative ... The fairness doctrine in the past has had no such overall effect.[111]

The Court in *Red Lion* expressly stated that it would reconsider its holding "if experience with the administration of [the fairness doctrine] indicates that [it] ha[s] the net effect of reducing rather than enhancing the volume and quality of coverage [of controversial issues of public importance]."[112]

2. *Application of the Red Lion Standard*

39. Under the standard enunciated by the Supreme Court for assessing the constitutionality of broadcast regulation, "it is the right of the viewers and listeners and not the broad-

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[110]*Meredith Corp. v. FCC*, 809 F.2d at 867, quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 388. The Court in *Red Lion* considered, *inter alia*, the state of technology in 1969 in deciding to apply a special, lenient constitutional standard to broadcast regulation. *Id.* at 396-400. It specifically recognized that "[t]he rapidity with which technological advances succeed one another ... makes it unwise [for it] to speculate on the future allocation of that space." *Id.* at 399. The technological advances in the electronic media since the *Red Lion* decision are discussed *infra* at 67-61.

[111]*Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 393.

[112]*Id.* at 391.

casters which are paramount."[113] This standard permits the government to regulate the speech of broadcasters in order to promote the interest of the public in obtaining access to diverse viewpoints.[114]

40. In subsequent cases applying the *Red Lion* standard, the Supreme Court also recognized expressly that broadcasters have substantial rights under the First Amendment.[115] Indeed, the Court specified that in furthering the public's interest in viewpoint diversity, it "must necessarily rely in large part upon the editorial initiative and judgment of the broadcasters ... ."[116] The Court has emphasized that "broadcasters are 'entitled under the First Amendment to exercise "the widest journalistic freedom consistent with their public [duties]."'[117] In addition, it has held that governmental

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[113]*Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 390.

[114]The *Red Lion* Court specified that:

> It is the right of the public to receive suitable access to social, political, esthethic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

Red Lion Broadcasting Co. v. FCC, 395 U.S. at 390. *Accord FCC v. League of Women Voters of California*, 468 U.S. at 377-78.

[115]*See, e.g., FCC v. League of Women Voters of California*, 468 U.S. at 378; *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 110.

[116]*FCC v. League of Women Voters of California*, 468 U.S. at 378 (citation omitted).

[117]*FCC v. League of Women Voters of California*, 468 U.S. at 378, quoting *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981), quoting *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 110. The Court has emphasized that broadcasters have a significant amount of editorial discretion under the First Amendment. It has stated, in the context of a broadcast case, that:

> For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper and broadcast—can and do abuse this power is beyond doubt

restrictions on broadcasters' speech are permissible under the First Amendment only in situations in which those restrictions are "narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues."[118]

41. An assessment of the constitutionality of the fairness doctrine under the standard established by *Red Lion* and its progeny, therefore, "requires a critical examination of the interests of the public and broadcasters."[119] We shall thus consider the constitutionality of the fairness doctrine from the perspective both of the public and the broadcast licensees. In so doing, we shall examine the record developed in this case and in the *1985 Fairness Report*[120] to determine, in ac-

> but. . .the presence of these risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression.

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. at 124-25.

[118]*FCC v. League of Women Voters of California*, 468 U.S. at 380 (citation omitted). We note that this standard appears similar to the one employed in evaluating time, place and manner restrictions on the expression of non-electronic speech. *See, e.g., Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293 (1984); *City of Renton v. Playtime Theatres*, 106 S.Ct. at 928. In general, the Court utilizes the lenient "time, place and manner" standard only in situations involving content-neutral regulations. *E.g., Clark v. Community for Creative Nonviolence*, 468 U.S. at 293. In *League of Women Voters*, the Court used this standard in evaluating a statute regulating speech on broadcast frequencies that was not content-neutral, presumably because of a lesser First Amendment right afforded broadcasters.

[119]*FCC v. League of Women Voters of California*, 468 U.S. at 381.

[120]We hereby incorporate the findings in the *1985 Fairness Report* into this record and, as more fully explained below, reaffirm the findings and conclusions contained in that Report.

cordance with existing Supreme Court precedent, whether the enforcement of the fairness doctrine (1) chills speech and results in the net reduction of the presentation of controversial issues of public concern[121] and (2) excessively infringes on the editorial discretion of broadcast journalists and involves unnecessary government intervention to the extent that it is no longer narrowly tailored to meet its objective.[122]

(a) Chilling Effect of the Doctrine

42. In the *1985 Fairness Report*, the Commission evaluated the efficacy of the fairness doctrine in achieving its regulatory objective. Based upon the compelling evidence of record, the Commission determined that the fairness doctrine, in operation, thwarts the purpose that it is designed to promote. Instead of enhancing the discussion of controversial issues of public importance, the Commission found that the fairness doctrine, in operation, "chills" speech.

43. The Commission documented that the fairness doctrine provides broadcasters with a powerful incentive not to air controversial issue programming above that minimal amount required by the first part of the doctrine.[123] Each time a broadcaster presents what may be construed as a controversial issue of public importance, it runs the risk of a complaint being filed, resulting in litigation and penalties, including loss of license. This risk still exists even if a broadcaster has met its obligations by airing contrasting viewpoints, because the process necessarily involves a vague standard, the application and meaning of which is hard to predict. Therefore, by limiting

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[121] *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 391, 393; *FCC v. League of Women Voters of California*, 468 U.S. at 378 n. 12.

[122] *See FCC v. League of Women Voters of California*, 468 U.S. at 378, 380.

[123] *1985 Fairness Report*, 102 FCC 2d at 161.

the amount of controversial issue programming to that required by the first prong (*i.e.*, its obligation to cover controversial issues of vital importance to the community), a licensee is able to lessen the substantial burdens associated with the second prong of the doctrine (*i.e.*, its obligation to present contrasting viewpoints) while conforming to the strict letter of its regulatory obligations. The licensee, consistent with its fairness doctrine obligations, may forego coverage of other issues that, although important, do not rise to the level of being vital.

44. As the Commission demonstrated, the incentives involved in limiting the amount of controversial issue programming are substantial. A broadcaster may seek to lessen the possibility that an opponent may challenge the method in which it provided "balance" in a renewal proceeding. If it provides one side of a controversial issue, it may wish to avoid either a formal Commission determination that it violated agency policy or the financial costs of providing responsive programming. More important, however, even if it intends to or believes that it has presented balanced coverage of a controversial issue, it may be inhibited by the expenses of being second-guessed by the government in defending a fairness doctrine complaint at the Commission, and if the case is litigated in court, the costs of an appeal. Further, in view of its dependence upon the goodwill of its audience, a licensee may seek to avoid the possible tarnish to its reputation that even an allegation that it violated the governmental policy of "balanced" programming could entail.[124]

45. Furthermore, the Commission determined that the doctrine inherently provides incentives that are more favorable to the expression of orthodox and well-established opinion with respect to controversial issues than to less established view-

[124] *1985 Fairness Report*, 102 FCC 2d at 157-69.

points.[125] The Commission pointed out that a number of broadcasters who were denied or threatened with the denial of renewal of their licenses on fairness grounds had provided controversial issue programming far in excess of the typical broadcaster. Yet these broadcasters espoused provocative opinions that many found to be abhorrent and extreme, thereby increasing the probability that these broadcasters would be subject to fairness doctrine challenges.[126] The Commission consequently expressed concern that the doctrine, in operation, may have penalized or impeded the expression of unorthodox or unpopular opinion,[127] depriving the public of debates on issues of public opinion that are "uninhibited, robust, and wide-open."[128] The doctrine's encouragement to cover only major or significant viewpoints, with which much of the public will be familiar, inhibits First Amendment goals of ensuring that the public has access to innovative and less popular viewpoints.

46. As noted above, these various incentives are not merely speculative. The record compiled in the fairness inquiry revealed over 60 reported instances in which the fairness doctrine inhibited broadcasters' coverage of controversial issues. Although some have sought to disparage or discount the significance of some of the specific examples cited, we have carefully reviewed these criticisms and continue to believe that those specific instances of broadcasters' conduct were broadly

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[125] *Id. at* 188-90.

[126] *1985 Fairness Report*, 102 FCC 2d at 189.

[127] *Id.* at 188.

[128] *New York Times v. Sullivan*, 376 U.S. at 270. It should be noted that compliance with the fairness doctrine may involve the presentation of multiple opposing viewpoints. The notion that there are only two sides to any controversial issue of public importance is simplistic and, in most cases, unrealistic.

illustrative of a prevalent reaction to the doctrine[129] and that the record from the inquiry overwhelmingly demonstrated that broadcasters act upon those incentives and limit the amount of controversial issue programming presented on the airwaves.

47. The Commission demonstrated in the *1985 Fairness Report* that broadcasters — from network television anchors to those in the smallest radio stations—recounted that the fear of governmental sanction resulting from the doctrine creates a climate of timidity and fear, which deters the coverage of controversial issue programming.[130] The record contained numerous instances in which the broadcasters decided that it was "safer" to avoid broadcasting specific controversial issue programming, such as series prepared for local news programs, than to incur the potentially burdensome administrative, legal, personnel, and reputational costs of either complying with the doctrine or defending their editorial decisions to governmental authorities. Indeed, in the *1985 Fairness Report*, the Commission gave specific examples of instances in which broadcasters declined to air programming on such important controversial issues such as the nuclear arms race, religious cults, municipal salaries, and other significant matters of public concern.[131] In each instance, the broadcaster identified the fairness doctrine as the cause for its decision.

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[129]As we noted in the *1985 Fairness Report*, 102 FCC 2d at 181, a broadcaster's admission that it is inhibited from covering controversial issues of public importance is, to some extent, an admission against interest, because both journalistic standards and (in certain cases) government regulation require such coverage. Therefore, we believe that there are many more broadcasters who have been chilled, but have not so openly admitted, than the number of those who admitted so in the *1985 Fairness Report*.

[130]*Id.* at 171.

[131]*Id.* at 172-74.

48. The record in the fairness inquiry demonstrated that this self-censorship is not limited to individual programs. In order to avoid fairness doctrine burdens, the Commission found that stations have adopted company "policies" which have the direct effect of diminishing the amount of controversial material that is presented to the public on broadcast stations. For example, some stations refuse to present editorials; other stations will not accept political advertisements[132]; still others decline to air public issue (or editorial) advertising; and others have policies to decline acceptance of nationally produced programming that discusses controversial subjects or to have their news staffs avoid controversial issues as a matter of routine.[133] The Commission concluded, therefore, that the doctrine "inhibits the presentation of controversial issues of public importance to the detriment of the public and in degradation of the editorial prerogatives of broadcast journalists."[134]

49. Further, we believe that enforcement actions such as the one in this proceeding provide substantial disincentives to broadcasters to cover controversial issues of importance in their community. As a direct result of the Commission second-guessing the editorial discretion of Meredith's station WTVH in its coverage of an important, controversial issue, Station WTVH became embroiled in a burdensome, regulatory quagmire. Even though it has, under today's decision, ultimate-

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[132]The political advertisements referred to by the Commission in the 1985 Fairness Report are those that would not be subject to the reasonable access requirements of 47 U.S.C. 312(a)(7) and could therefore be declined for broadcast by the licensee. *See generally id.* at 174-77, and *supra* note 91.

[133]*Id.* at 169-80. For example, in the Syracuse market from which the instant case arises, another commercial television station, WSTM, had a "policy" never to accept advocacy advertising. See *Syracuse Peace Council Complaint*, Exh. 2 (filed Dec. 12, 1983) (Letter from Corinne Kinane to Thomas Slaughter at 1-2).

[134]*1985 Fairness Report*, 102 FCC 2d at 147.

ly prevailed in this adjudication, the station has incurred substantial litigation expenses associated with the initial reconsideration proceeding, the case on appeal and the subsequent remand. Its reputation has been tarnished for nearly three years by a formal adjudication by this Commission that it was unfair in its programming and somehow did not live up to professional journalistic standards. In addition, its editorial judgment as a broadcast journalist has been subject to question by government authorities. Based upon this experience, we believe that, if we were to continue to impose the doctrine, some broadcasters would continue to seek to avoid the substantial burdens associated with the doctrine by limiting their coverage of controversial issues of public importance.

50. Several commenters in this adjudication challenge the Commission's determination in 1985 that the fairness doctrine in operation inhibits the expression of controversial issues of public importance. The arguments presented by these parties, however, are the same contentions which already have been carefully considered and rejected by the Commission in its *1985 Fairness Report.*[135] Therefore, for the reasons set forth in that Report, we do not find them persuasive, and we reaffirm the fundamental determinations contained in the *1985 Fairness Report.*

51. Fisher Broadcasting Inc. was the sole broadcaster in this proceeding to assert to us that the fairness doctrine has not inhibited its stations' coverage of controversial issues of public importance.[136] In the 1985 inquiry, Westinghouse Broadcasting & Cable Co. was the sole broadcaster to make a similar claim.[137] We do not believe, however, that statements by these

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[135] *Id.* at 167-68, 180-87.

[136] *Fisher Comments* at 3.

[137] *1985 Fairness Report*, 102 FCC 2d at 181-82.

or other licensees demonstrate generally an absence of a "chilling effect" in the broadcasting industry. As we stated in the *1985 Fairness Report:*

> [W]e do not believe that the isolated representations of some broadcasters to the effect that the doctrine does not have any effect on the type, frequency or duration of the controversial viewpoints they air are probative of an absence of chilling effect within the industry as a whole; the fact that some broadcasters may not be inhibited in the presentation of controversial issues of public importance does not prove that broadcasters in general are similarly uninhibited.[138]

The record in that *Report* demonstrates that many broadcasters are in fact inhibited by fairness doctrine burdens from covering controversial issues of public importance. No broadcaster indicated to us that its coverage of controversial issues has increased as a result of the fairness doctrine, and absent such evidence to offset the numerous instances of chill that we have identified, we can only conclude that the *overall* net effect of the doctrine is to reduce the coverage of controversial issues of public importance, in contravention of the standard announced in *Red Lion.*[139]

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138 Id. at 182.

[139]*Red Lion Broadcasting Co. v. FCC,* 395 U.S. at 391. Certain parties, such as Safe Energy Communication Council, set forth case studies in support of their view that the fairness doctrine promotes the discussion of controversial issues of public importance. In light of the substantial evidence contained in the *1985 Fairness Report,* however, we remain convinced that the net effect of the doctrine is to inhibit the expression of opinion on important public issues.

(b) The Extent and Necessity of Government Intervention into Editorial Discretion

52. As explained above, the Supreme Court has held that restrictions on the content of broadcasters' speech must be narrowly tailored to achieve a substantial government interest in order to pass constitutional muster.[140] As part of an analysis of such a requirement, we look to the *1985 Fairness Report*, in which the Commission examined the appropriate role of government in regulating the expression of opinion. Historically, the Commission has taken the position that the agency had an affirmative obligation, derived from the First Amendment, to oversee the content of programming through enforcement of the fairness doctrine in order to ensure the availability of diverse viewpoints to the public.[141] After careful reflection, however, the Commission, with respect to the fairness doctrine, repudiated the notion that it was proper for a governmental agency to intervene actively in the marketplace of ideas.[142] The Commission found that the enforcement of the

[140] *FCC v. League of Women Voters of California*, 468 U.S. at 380.

[141] For example, in what it characterized as "a different approach to the First Amendment," the Commission justified the fairness doctrine in its *1974 Fairness Report*, by taking the position that the agency had an affirmative obligation under the Constitution to impose restrictions on the speech of broadcasters in order to promote "balanced" controversial issue programming. 48 FCC 2d at 3. Even at the time of the 1974 Fairness Report, however, the Commission recognized the anomaly in justifying governmental scrutiny of speech allegedly to "promote" First Amendment values. *See supra* 83-94.

[142] *See 1985 Fairness Report*, 102 F.2d at 224-25. The Supreme Court has unambiguously repudiated any notion that the First Amendment affirmatively requires governmental intervention to ensure diversity in the marketplace of ideas. *In Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 126-30, the Court reversed a lower appellate court decision which held that there was a constitutionally mandated "right of access" on the part of individual members of the public to have "some opportunity to take the initiative and editorial control into their own hands on the broadcast media." *Business Executives' Moves*

doctrine requires the "minute and subjective scrutiny of program content,"[143] which perilously treads upon the editorial prerogatives of broadcast journalists. The Commission further found that in administering the doctrine it is forced to undertake the dangerous task of evaluating particular viewpoints.[144] The fairness doctrine thus indisputably represents an intrusion into a broadcaster's editorial discretion, both in its enforcement and in the threat of enforcement. It requires the government to second-guess broadcasters' judgment on the issues they cover, as well as on the manner and balance of coverage. The penalties for noncompliance range from being required to provide free air time, under some circumstances, to providing contrasting viewpoints, in others, to loss of license, in extreme cases. Even though an individual

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for Vietnam Peace v. FCC, 450 F.2d 642, 656 (D.C.Cir.1971), *rev'd sub nom. Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973). In deciding that members of the public had no constitutional right to place editorial advertisements, the Supreme Court emphasized that broadcasters have editorial discretion to determine the material which is to be covered. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 124-26. Further, noting the "difficult problems involved in implementing ... a right of access," the Court recognized that a "problem of critical importance to broadcast regulation and the First Amendment [is] the risk of an enlargement of government control over the content of broadcast discussion of public issues." *Id.* at 126. *See Public Interest Research Group v. FCC*, 522 F.2d 1060, 1067 (D.C.Cir.1975), *cert. denied*, 424 U.S. 965 (1976) (court of appeals rejected contention that the First Amendment mandates enforcement of the fairness doctrine); *see also TRAC v. FCC*, 801 F.2d at 518.

[143] *1985 Fairness Report*, 102 FCC 2d at 191.

[144] Judge Bazelon recognized the danger in such a task when he stated: "Truth and fairness have a too uncertain quality to permit the government to define them . . . . [I]n order to determine what the 'other side' is, one has to have an objective concept of truth against which to compare the challenged speech. And who in this country is in possession of this objective concept of truth?" Bazelon, "FCC Regulation of the Telecommunications Press," 75 Duke L.J. 213, 236-37 (1975).

violation might not lead to license revocation, the court in *Meredith* noted that the mere finding of a violation "has its own coercive impact."[145]

53. In this regard, the Commission noted that, under the fairness doctrine, a broadcaster is only required to air "*major* viewpoints and shades of opinion" to fulfill its balanced programming obligation under the second part of the doctrine.[146] In administering the fairness doctrine, therefore, the Commission is obliged to differentiate between "significant" viewpoints which warrant presentation to fulfill the balanced programming obligation and those viewpoints that are not deemed "major" and thus need not be presented. The doctrine forces the government to make subjective and vague value judgments among various opinions on controversial issues to determine whether a licensee has complied with its regulatory obligations.[147]

54. In addition, the Commission expressed concern that the fairness doctrine provides a dangerous vehicle—which had been exercised in the past by unscrupulous officials—for the intimidation of broadcasters who criticize governmental policy.[148] It concluded that the inherently subjective evaluation of program content by the Commission in administering the doctrine contravenes fundamental First Amendment principles.[149] We reaffirm these determinations and find that en-

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[145] *Meredith Corp. v. FCC*, 809 F.2d at 873.

[146] *1974 Fairness Report*, *supra* note 2, at 15.

[147] *See, e.g., Coates v. Cincinnati*, 402 U.S. 611 (1970); *Cohen v. California*, 403 U.S. 15 (1970).

[148] *1985 Fairness Report*, 102 FCC 2d at 192-94.

[149] In the *1985 Fairness Report*, the Commission determined that the administration of the doctrine requires the agency to make detailed determinations which are necessarily subjective. *See, e.g., id.* at 183 n. 147.

forcement of the fairness doctrine necessarily injects the government into the editorial process of broadcast journalists.

55. In further analyzing whether the fairness doctrine is narrowly tailored to achieve a substantial government interest, we look again to our evaluation in the *1985 Fairness Report* of whether this type of government regulation is in fact necessary to ensure the availability of diverse sources of information and viewpoints to the public.[150] In that *Report* the Commission undertook a comprehensive review of the information outlets currently available to the public. This review, as discussed in more detail below,[151] revealed an explosive growth in both the number and types of such outlets in every market since the 1969 *Red Lion* decision. And this trend has continued unabated since 1985. For example, 96% of the public now has access to five or more television stations. Currently, listeners in the top 25 markets have access to an average of 59 radio stations, while those in even the smallest markets have access to an average of six radio stations. In contrast to that, only 125 cities have two or more daily newspapers published locally. Nationwide, there are 1315 television and 10,128 radio stations, while recent evidence indicates that there are 1657 daily newspapers. The number of television stations represents a 54% increase since the *Red Lion* deci-

[150]Although the standard announced in League of Women Voters only requires the Commission to determine whether the doctrine is *narrowly tailored*—not *necessary*—to achieve a substantial government interest, our report in 1985 went so far as to determine that the doctrine was not necessary to achieve its purpose. Having determined that the doctrine is not necessary to serve a substantial government interest, then its intrusive means into the editorial process cannot possibly be narrowly tailored.

[151]*See infra* 67-71. At this point in the discussion, we note that the increase in the number of media outlets available to the public not only discredits the claim of numerical scarcity in the electronic media, but also demonstrates that the doctrine is no longer narrowly tailored to achieve its objective.

sion, while the number of radio stations represents a 57% increase. Not only has the number of television and radio stations increased the public's access to a multiplicity of media outlets since 1969, but the advent and increased availability of such other technologies as cable and satellite television services have dramatically enhanced that access. As a result of its 1985 review, the Commission determined that "the interest of the public in viewpoint diversity is fully served by the multiplicity of voices in the marketplace today"[152] and that the growth in both radio and television broadcasting alone provided "a reasonable assurance that a sufficient diversity of opinion on controversial issues of public importance [would] be provided in each broadcast market."[153] It concluded, therefore, and we continue to believe, that government regulation such as the fairness doctrine is not necessary to ensure that the public has access to the marketplace of ideas.

56. None of the commenters in this proceeding has challenged the underlying data contained in the *1985 Fairness Report* demonstrating the significant increase in the number and types of information services. In its Comments, however, the ACLU attempts to discount the importance of the Commission's findings. For example, disputing the significance of the substantial growth in the number of television stations, the ACLU argues that most of this increase has been in UHF independent stations which, it speculates, may not contribute to the diversity of viewpoints.[154] We disagree. The ACLU has provided no meaningful basis for us to reconsider our conclusion that independent stations can contribute—and do contribute—significantly to the marketplace of ideas. Therefore, we continue to believe that the contributions of UHF stations must

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[152] *1985 Fairness Report*, 102 FCC 2d at 147.

[153] *Id.* at 208.

[154] ACLU Comments at 8-11.

be considered in any meaningful assessment of the information services marketplace.[155]

57. In its Comments, the ACLU also attempts to downplay the importance of our finding that the number of signals received by individual television viewers has increased substantially. In making its argument, the ACLU does not question the existence of the substantial growth in the number of signals available to individual television households.[156] Rather, it argues that not all of the signals of these stations originate in the viewers' community of license.[157] However, as we stated in our *1985 Fairness Report,* in assessing viewpoint diversity in the context of the fairness doctrine, "the relevant inquiry is not what stations are licensed to a community, but rather what broadcast signals [an individual] can actually receive."[158] Viewers can obtain information on controversial issues of public importance from stations which they can receive whether or not the signal happens to originate in their community.[159]

[155]Citing newspaper and magazine articles, the ACLU contends that some of these stations are "struggling for economic survival." *Id.* at 8-9. As we stated in our 1985 Fairness Report, however, we believe that "the growth of this service—113 percent since *Red Lion*—is evidence of its economic viability." 102 FCC 2d at 206. While every station may not be successful, we do not believe that any persuasive evidence has been proffered to justify a conclusion that electronic media choices will not continue to increase or that they will not continue to contribute to the diversity of viewpoints.

[156]Indeed, it specifically cites the Commission's finding that 96 percent of all television households are capable of receiving five or more off-the-air television signals. ACLU Comments at 9.

[157]*Id.* at 9.

[158]*1985 Fairness Report,* 102 FCC 2d at 219 (citation omitted).

[159]In addition, we reject ACLU's contention that there may be no increase in viewpoint diversity from the increase in the number of television stations because the members of the public may choose not to listen or to view the controversial opinions that are broadcast. *See* ACLU Comments at 10. The Commission cannot force the dissemination of information on unwilling listeners and viewers. Our concern is properly limited to the availability of information sources, rather than whether a particular individual may choose to receive information from them.

Similarly, citing the *1985 Fairness Report*, the ACLU acknowledges that the number of radio stations has increased dramatically.[160] It speculates, however, that "despite the dramatic growth of radio over the past three decades, viewpoint diversity on controversial issues of public importance *may* not have changed. . . ."[161] Specifically, it argues that most of the increase is in FM stations which, in its view, carry less controversial issue programming than their counterparts, and that public affairs programming on radio generally has decreased.[162] We are not persuaded by these speculative contentions. To the contrary, we remain convinced that the dramatic growth in the number of both radio stations and television stations has in fact increased the amount of information, as well as the diversity of viewpoints, available to the public in both large and small broadcast markets.[163] We therefore reaffirm our determination in the *1985 Fairness Report* that the fairness doctrine is not necessary in any market to ensure that the public has access to diverse viewpoints from today's media

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[160]*Id.* at 12. Indeed, it recognizes that the number of radio stations has increased by "280 percent since the Commission's 1949 Fairness Report; 48 percent since the Supreme Court's 1969 *Red Lion* decision; and 30 percent since the Commission's *1974 Fairness Report.*" *Id.* at 12 (citation omitted).

[161]*Id.* at 15 (emphasis added).

[162]*Id.* at 10-14.

[163]ACLU asserts that the "average" person listens to only a few stations. Because most radio listeners actually hear only the viewpoints which are aired on a few stations, ACLU suggests that the growth in the number of stations does not equate with an increase in viewpoint diversity. *Id.* at 14. It also states that "people primarily rely today on television for news and public affairs, and increasingly consider radio to be largely an entertainment medium." *Id.* at 15. We believe, however, that the relevant criterion is the available information rather than the actual listening patterns of the public. Furthermore, the number of radio stations providing an all-news/public affairs format, news breaks or top of the hour news spots leads us to conclude that listeners do not rely on radio only for its entertainment programming.

outlets. Its intrusive means of interfering with broadcasters' editorial discretion, therefore, can no longer be characterized as narrowly tailored to meet a *substantial* government interest.

(c) Conclusion

58. As noted above, under the standard of review set forth in *Red Lion*, a governmental regulation such as the fairness doctrine is constitutional if it furthers the paramount interest of the public in receiving diverse and antagonistic sources of information. Under *Red Lion*, however, the constitutionality of the fairness doctrine becomes questionable if the chilling effect resulting from the doctrine thwarts its intended purpose. Applying this precedent, we conclude that the doctrine can no longer be sustained.

59. In the *1985 Fairness Report*, we evaluated whether the fairness doctrine achieved its purpose of promoting access to diverse viewpoints. After compiling a comprehensive record, we concluded that, in operation, the fairness doctrine actually thwarts the purpose which it is designed to achieve. We found that the doctrine inhibits broadcasters, on balance, from covering controversial issues of public importance. As a result, instead of promoting access to diverse opinions on controversial issues of public importance, the actual effect of the doctrine is to "overall lessen[ ] the flow of diverse viewpoints to the public."[164] Because the net effect of the fairness doctrine is to reduce rather than enhance the public's access to viewpoint diversity, it affirmatively disserves the First Amendment interests of the public. This fact alone demonstrates that the

[164] *1985 Fairness Report*, 102 FCC 2d at 171.

fairness doctrine is unconstitutional under the standard of review established in Red Lion.[165]

60. Furthermore, almost two decades of Commission experience in enforcing the fairness doctrine since *Red Lion* convince us that the doctrine is also constitutionally infirm because it is not narrowly tailored to achieve a substantial government interest. Because the fairness doctrine imposes substantial burdens upon the editorial discretion of broadcast journalists and, because technological developments have rendered the doctrine unnecessary to ensure the public's access to viewpoint diversity, it is no longer narrowly tailored to meet a substantial government interest and therefore violates the standard set forth in *League of Women Voters*.[166] The doctrine requires the government to second-guess broadcasters' judgment on such sensitive and subjective matters as the "controversiality" and "public importance" of a particular issue, whether a particular viewpoint is "major," and the "balance" of a particular presentation. The resultant overbreadth of the government's inquiry into these matters is demonstrated by the chill in speech that we have identified. The doctrine exacts a penalty, both from broadcasters and, ultimately, from the public, for the expression of opinion in the electronic press. As a result, broadcasters are denied the editorial discretion accorded to other journalists, and the public is deprived of a more vigorous marketplace of ideas, unencumbered by governmental regulation.

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[165]The Court expressly stated that:

> were it to be shown by the Commission that the fairness doctrine has "the net effect of reducing rather than enhancing" speech, we would then be forced to reconsider the constitutional basis of our decision in that case. *FCC v. League of Women Voters of California*, 468 U.S. at 378 n. 12, quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 393 (emphasis added).

[166]*FCC v. League of Women Voters of California*, 460 U.S. at 380.

61. In sum, the fairness doctrine in operation disserves both the public's right to diverse sources of information and the broadcaster's interest in free expression. Its chilling effect thwarts its intended purpose, and it results in excessive and unnecessary government intervention into the editorial processes of broadcast journalists. We hold, therefore, that under the constitutional standard established by Red Lion and its progeny, the fairness doctrine contravenes the First Amendment and its enforcement is no longer in the public interest.

C. PREFERRED CONSTITUTIONAL APPROACH

62. Our review of the Supreme Court precedent in the application of First Amendment principles to the electronic media leads to an inescapable conclusion: throughout the development of these principles, the Supreme Court has repeatedly emphasized that its constitutional determinations in this area of the law are closely related to the technological changes in the telecommunications marketplace. For example, in the Red Lion decision itself, the Court indicated that advances in technology could have an effect on its analysis of the constitutional principles applicable to the electronic media.[167] The Court of Appeals noted this in *Meredith v. FCC*, when it said that the *Red Lion* decision "was expressly premised on the scarcity of broadcast frequencies 'in the present state of commercially available technology' as of 1969."[168] And in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, the Supreme Court stated that:

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[167]*See Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 397-99 (indicating that its decision was based on the technology of the day).

[168]*Meredith Corp. v. FCC*, 809 F.2d at 867, quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 388.

> Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of great delicacy and difficulty. . . The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded ten years hence.[169]

63. The Court's most recent statement on this issue came in its decision in *FCC v. League of Women Voters of California*. Acknowledging that certain persons, including former Chairman Mark Fowler, "charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete,"[170] the Court indicated that it may be willing to reassess its traditional reliance upon spectrum scarcity upon a "signal" from the Congress or this Commission "that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."[171]

64. That principles applicable to the government's regulation of a rapidly changing industry such as telecommunications

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[169]412 U.S. at 102.

[170]468 U.S. at 376 n. 11 (citations omitted).

[171]*Id.* at 377 n. 11. The United States Court of Appeals for the District of Columbia Circuit on several occasions has also indicated that the increase in the number of information outlets may affect the extent to which the speech of broadcasters is protected under the First Amendment. *Loveday v. FCC*, 707 F.2d 1443, 1459 (D.C.Cir.), *cert. denied*, 464 U.S. 1008 (1983); *Banzhaf v. FCC*, 405 F.2d 1000 (D.C.Cir.1968), *cert. denied*, 396 U.S. 842 (1969). *See TRAC v. FCC*, 801 F.2d at 508 nn. 4-5.

should be revisited and revised in light of technological advances is not an unusual proposition. Indeed, the Commission, in its task of managing an ever-changing technological and economic marketplace, has the responsibility to consider new developments in reviewing existing, and in applying new, rationales in that marketplace.[172] With respect to the fairness doctrine itself, a policy that the Commission defended before the Supreme Court in 1969, our comprehensive study of the telecommunications market in the *1985 Fairness Report* has convinced us that a rationale that supported the doctrine in years past is no longer sustainable in the vastly transformed, diverse market that exists today. Consequently, we find ourselves today compelled to reach a conclusion regarding the constitutionality of the fairness doctrine that is very different from the one we reached in 1969.

65. We believe that the *1985 Fairness Report*, as reaffirmed and further elaborated on in today's action, provides the Supreme Court with the signal referred to in *League of Women Voters*.[173] It also provides the basis on which to reconsider its application of constitutional principles that were developed

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[172]*E.g., Television Deregulation, supra* note 101; *Radio Deregulation, supra* note 101. It is appropriate for an administrative agency to modify or eliminate its policies if the conditions addressed by the regulation have changed. *See, e.g., NAACP v. FCC*, 682 F.2d 993, 998 (D.C.Cir.1982). *See generally, Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. at 57. As the Supreme Court has stated, "the Commission should be alert to the consequences of its policies and should stand ready to alter its rule if necessary to serve the public interest more fully." *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 603 (1981). Further, an agency should not continue to regulate if it can no longer perceive a need for governmental regulation. *NAACP v. FCC*, 682 F.2d at 1000-01.

[173]In fact, the D.C. Circuit also suggested that our *1985 Fairness Report* was such a signal. *Branch v. FCC*, No. 86-1256, slip op. at 25-26 (D.C.Cir. July 21, 1987); *see also TRAC v. FCC*, 801 F.2d at 509 n. 5.

for a telecommunications market that is markedly different from today's market. We further believe that the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press. Therefore, in response to the question raised by the Supreme Court in *League of Women Voters*, we believe that the standard applied in *Red Lion* should be reconsidered and that the constitutional principles applicable to the printed press should be equally applicable to the electronic press.

1. Basis for Reconsidering *Red Lion*

66. In the *1985 Fairness Report*, the Commission examined, in a comprehensive manner, the number and types of outlets currently providing information to the public, including the traditional broadcast services, the new electronic sources, and the print media.[174] The Commission found in recent years that there had been an explosive growth in both the number and types of outlets providing information to the public. Hence, the Supreme Court's apparent concern that listeners and viewers have access to diverse sources of information has now been allayed.

67. With respect to the number of radio stations, the Commission demonstrated that in 1985 there were 9,766 radio stations nationwide, a 48 percent increase in radio stations overall since the date of the Supreme Court's decision in Red Lion and a 30 percent increase in the number of radio stations since the 1974 Fairness Report. As stated above, that number now stands at 10,128 a 54% increase since the 1969 *Red Lion* deci-

[174]Because "the various media are in fact information substitutes in the marketplace of ideas" (*1985 Fairness Report*, 102 FCC 2d at 199), the Commission determined that it was appropriate to consider the different outlets in the information services marketplace in assessing the continued need for the fairness doctrine. *Id.* at 198-202.

sion. The Commission also concluded in the *1985 Fairness Report* that the growth in FM stations, in particular, had been dramatic. Specifically, the Commission found that this service had increased by 113 percent since the Red Lion decision and by 60 percent since the *1974 Fairness Report*.[175] Further, the Commission found "of particular significance" the fact that the number of radio voices in each local market had grown.[176] With continuing technological advances in spectrum efficiency, the Commission predicted that the number of radio outlets would continue to increase.[177]

68. With respect to television stations, the Commission documented that in 1985 the number of television stations overall was 1,208, an increase of 44.3 percent since the *Red Lion* decision and 28 percent since *1974 Fairness Report*. And that number has increased to 1315 today, a 57% increase since the 1969 *Red Lion* decision. The Commission also found in the *1985 Fairness Report* the growth in UHF stations in particular to have been even more dramatic than the overall growth in television stations: the number of UHF stations increased by 113 percent since the *Red Lion* decision and 66.4 percent since the *1974 Fairness Report*. The Commission found further that the growth in television broadcasting has directly resulted in a significant increase in the number of signals available to individual viewers in both the larger and smaller markets. Specifically, without the enhancing capability of cable television, the Commission determined that 96 percent of the television households receive five or more television signals.

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[175] *1985 Fairness Report*, 102 FCC 2d at 202-04. Today, there are 5,241 FM stations, more than a 100% increase since *Red Lion*.

[176] *Id.* at 203.

[177] *Id.* We note that the numbers of radio stations cited by way of example herein do not include the number of outstanding allocations for which licenses have not yet been issued. Including recent FM radio allocations, 1266 allotments are available for licensing in due course by the Commission.

In 1964, only 59 percent of these households were able to receive five or more stations. With the growth of UHF television, the increase in the importance of independent television and the development of new program distribution systems among group owners, the Commission also found that the structure of the medium had become more competitive.[178]

69. Although the Commission found that the number of radio and television outlets alone ensured that the public had access to diverse sources of information in each broadcast market (large and small),[179] it also found that cable television, which had increased exponentially during the period from 1969 to 1985, had enhanced significantly the amount of information available to the public.[180] Since the 1974 Fairness Report, the Commission demonstrated that the number of persons subscribing to cable television had increased by 345 percent and the number of cable systems had increased by 111 percent. Based upon its assessment of the marketplace, the Commission predicted that cable television would continue to expand in the future. It determined further that there had been a significant change in the nature of cable service, as the number of channels available to individual subscribers had increased dramatically. For example, in 1969 only 1 percent of all cable systems had the capability of carrying more than 12 channels; by 1987 69 percent of all cable systems (and 92% of cable subscribers) had this capacity. Thus, in addition to the substantial increases in the absolute number of cable systems and in the percentage of cable subscribers, the Commission concluded that the amount of information available to

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[178] *Id.* at 204-07.

[179] *Id.* at 208.

[180] It is also significant that the presence of cable in the smaller markets may often enhance the number of accessible broadcast outlets in those markets. *See id.* at 210.

an individual viewer on a single cable system had increased.[181] The statistical data contained in ACLU's comments actually support a reaffirmation of this determination. Characterizing cable as "the most dynamic video medium today,"[182] the ACLU states that "[a]pproximately 71 million television households—74.7 percent of all television households—have access to cable television service."[183] It also notes that 47 percent of all television households are actual subscribers of that service.[184] It asserts further that both the availability and number of subscribers to cable television will continue to increase. Specifically, in three years it predicts that almost 90 percent of television households will have access to cable and that 54 percent will subscribe to it.[185]

70. In addition, the Commission evaluated the contributions of a number of new electronic technologies unavailable at the time of the *Red Lion* decision, including low power television, MMDS, video cassette recorders ("VCRs"), and satellite master antenna systems ("SMATV"). It found that each of these new services also were contributing significantly to the diversity of information available to the public.[186] Noting the development of a number of additional information technologies, the Commission determined that there were a number of other electronic services, such as direct home to satellite

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[181] *Id.* at 209-10; *Television Factbook*, Services Volume, at A-41 (1987).

[182] ACLU Comments at 18.

[183] *Id.* (citation omitted).

[184] More than 43,000,000 households now subscribe to cable services according to *Nielson Media Research* (1987).

[185] ACLU Comments at 18-19.

[186] *1985 Fairness Report*, 102 FCC 2d at 208-17. In its *1985 Fairness Report*, the Commission also considered the role of the print media in the information services marketplace. It concluded that newspapers and magazines, as well as the electronic media, contribute significantly to the marketplace of ideas. *Id.* at 217-18.

services, satellite news gathering, subscription television, FM radio subcarriers, teletext, videotext and home computers "have the potential of becoming substitute information sources in the marketplace of ideas."[187] Some of these technologies, such as teletext and videotext, are beginning to merge characteristics of the electronic media with those of the print media, further complicating the choice of an appropriate constitutional standard to be applied to their regulation.[188]

71. As noted above, none of the commenters in this proceeding has challenged the underlying data contained in the *1985 Fairness Report* with respect to the dramatic increase in the number and types of alternative technologies available to the public. For instance, ACLU's own data demonstrate the soundness of our determination that the number of broadcast outlets has exploded and that cable television has evolved into a significant information source. In its Comments, the ACLU also asserts that in the short period of time since the 1985 Fairness Report, the number of low power television stations has increased by 12 percent from 341 stations to 383 stations.[189]

72. We believe that the dramatic changes in the electronic media, together with the unacceptable chilling effect resulting from the implementation of such regulations as the fairness doctrine,[190] form a compelling and convincing basis on which to reconsider First Amendment principles that were developed for another market. Today's telecommunications market offers individuals a plethora of information outlets to which they

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[187]*Id.* at 214; *see id.* at 208-17.

[188]Additionally, newspaper reporters are increasingly relying on the use of the spectrum to send their messages to their editors and ultimately to the printing presses.

[189]ACLU Comments at 17.

[190]*See supra* 42-51.

have access on a daily basis. Indeed, this market is strikingly different from even that offered by the daily print media. While there are 11,443 broadcast stations nationwide, recent evidence indicates that there are only 1657 daily newspapers overall.[191] On a local level, 96% of the public has access to five or more television stations, while only 125 cities have two or more local newspapers. The one-newspaper town is becoming an increasing phenomenon. Our review of the Supreme Court's statements on the relationship between constitutional principles and technological developments leads us to conclude that it would now be appropriate for the Supreme Court to reassess its *Red Lion* decision.

2. The Scarcity Rationale

73. Certain parties, taking the position that the basis underlying the scarcity rationale in *Red Lion* is either illogical or anachronistic, assert that the appropriate constitutional test to assess content-based regulations of the electronic media is the one enunciated for the print media.[192] These commenters point to the explosive growth in the number and types of information sources in support of their assertion that the scarcity doctrine is no longer viable. Other commenters, in contrast, state that the general standards of First Amendment jurisprudence applied by the Court in cases not involving broadcast regulation are irrelevant in determining whether the fairness doctrine and other content-based regulations are constitutional. They assert that the increase in the number and types of information sources has nothing to do with the existence of scarcity in the constitutional sense, and emphasize

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[191]Of the media universe that is composed of newspapers, AM and FM radio stations, and television stations, 87% is made up of broadcast facilities.

[192]*See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1971); *see also infra* 95-96.

that the appropriate standard of review is that applied by the Court in *Red Lion* and its progeny specifically relating to broadcast regulation.[193] These parties describe two different notions of scarcity—numerical scarcity and spectrum (or allocational) scarcity. We do not believe that any scarcity rationale justifies differential First Amendment treatment of the print and broadcast media.

74. As stated above, we no longer believe that there is scarcity in the number of broadcast outlets available to the public. Regardless of this conclusion, however, we fail to see how the constitutional rights of broadcasters—and indeed the rights of the public to receive information unencumbered by government intrusion—can depend on the number of information outlets in particular markets. Surely, a requirement of multiple media outlets could not have formed the basis for the framers of the First Amendment to proscribe government interference with the editorial process. At the time the First Amendment was adopted, there were only eight daily newspapers, seventy weekly newspapers, ten semi-weekly newspapers and three tri-weekly newspapers published in America.[194]

75. Because there is no longer a scarcity in the number of broadcast outlets, proponents of a scarcity rationale for the justification of diminished First Amendment rights applicable to the broadcast medium must rely on the concept of spectrum (or allocational) scarcity. This concept is based upon the

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[193]These commenters maintain that scarcity, as it has been defined by the Supreme Court, is a state where "there are substantially more individuals who want to broadcast than there are frequencies to allocate." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 388.

[194]*Inquiry Into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees* in Gen. Docket No. 84-252, 49 Fed.Reg. 20,317 (May 14, 1984) at 51.

physical limitations of the electromagnetic spectrum. Because only a limited number of persons can utilize broadcast frequencies at any particular point in time, spectrum scarcity is said to be present when the number of persons desiring to disseminate information on broadcast frequencies exceeds the number of available frequencies. Consequently, these frequencies, like all scarce resources, must be allocated among those who wish to use them.

76. In fact, spectrum scarcity was one of the bases articulated by the Court in *Red Lion* for the disparate treatment of the broadcast and the print media. Reliance on spectrum scarcity, however, "has come under increasing criticism in recent years."[195] For example, the Court of Appeals has recently questioned the rationality of spectrum scarcity as the basis for differentiating between the print and broadcast media. In *TRAC v. FCC*, the Court asserted that:

> [T]he line drawn between the print media and the broadcast media, resting as it does on the physical scarcity of the latter, is a distinction without a difference. Employing the scarcity concept as an analytic[al] tool ... inevitably leads to strained reasoning and artificial results.
>
> It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. . .. Since scarcity is a universal fact, it can hardly explain regulation

[195] *FCC v. League of Women Voters of California*, 468 U.S. at 376 n. 11.

> in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion.[196]

We agree with the court's analysis of the spectrum scarcity rationale, and we believe that it would be desirable for the Supreme Court to reconsider its use of a constitutional standard based upon spectrum scarcity in evaluating the intrusive type of content-based regulation at issue in this proceeding.

77. At the outset, we note that the limits on the number of persons who can use frequencies at any given time is not absolute, but is, in part, economic: greater expenditures on equipment and/or advances in technology could make it possible to utilize the spectrum more efficiently in order to permit a greater number of licensees. So the number of outlets in a market is potentially expandable, like the quantities of most other resources.

78. Nevertheless, we recognize that technological advancements and the transformation of the telecommunications market described above have not eliminated spectrum scarcity. All goods, however, are ultimately scarce, and there must be a system through which to allocate their use. Although a free enterprise system relies heavily on a system of property rights and voluntary exchange to allocate most of these goods, other methods of allocation, including first-come-first-served, administrative hearings, lotteries, and auctions, are or have been relied on for certain other goods. Whatever the method of allocation, there is not any logical connection between the method of allocation for a particular good and the level of constitutional protection afforded to the uses of that good.

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[196]801 F.2d at 508 (footnotes omitted). Asserting that the "scarcity" rationale is not a rational basis for distinguishing between the *Red Lion* and *Tornillo* decisions, the Court of Appeals in effect urged the Supreme Court to "revisit this area of the law." *Id.* at 509.

79. In the allocation of broadcast frequencies, the government has relied, for the most part, on a licensing scheme based on administrative hearings to promote the most effective use of this resource.[197] Congress has also authorized the allocation of frequencies through the use of lotteries.[198] Moreover, although the government allocates broadcast frequencies to particular broadcast speakers in the initial licensing stage, approximately 71% of today's radio stations and 54% of today's television stations have been acquired by the current licensees on the open market.[199] Hence, in the vast majority of cases, broadcast frequencies are "allocated"—as are the resources necessary to disseminate printed speech—through a functioning economic market. Therefore, after initial licensing, the only relevant barrier to acquiring a broadcast station is not governmental, but—like the acquisition of a newspaper—is economic.

80. Additionally, there is nothing inherent in the utilization of the licensing method of allocation that justifies the government acting in a manner that would be proscribed under a traditional First Amendment analysis. In contexts other than broadcasting, for example, the courts have indicated that, ***where licensing is permissible***, the First Amendment proscribes the government from regulating the content of fully protected

[197]A number of the provisions of the Communications Act and our implementing regulations relate to the licensing of broadcast frequencies and related functions. *See, e.g.*, 47 U.S.C. §§ 301-10 (1982). The system of licensing in the public interest established by the Communications Act of 1934, as amended, is designed to determine the persons who may utilize broadcast frequencies.

[198]47 U.S.C. 309(i) authorizes the Commission to award licenses for the use of the electromagnetic spectrum by random selection. The Commission has used lotteries to award licenses in such services as LPTV and cellular radio.

[199]The Commission passes on the basic qualifications of transferees once they have been identified by the existing licensee. *See generally* 47 U.S.C. 309. Of course, even upon transfer, the license carries with it the obligations imposed by the Communications Act.

speech.[200] There are those who argue that the acceptance by broadcasters of government's ability to regulate the content of their speech is simply a fair exchange for their ability to use the airwaves free of charge. To the extent, however, that such an exchange allows the government to engage in activity that would be proscribed by a traditional First Amendment analysis, we reject that argument. It is well-established that government may not condition the receipt of a public benefit on the relinquishment of a constitutional right.[201] The evil

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[200] *E.g., Cox v. New Hampshire*, 312 U.S. 569, 576 (1941); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Clark v. Community for Creative Non-Violence*, 468 U.S. at 293-95.

[201] *E.g., Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (Although no one has a constitutional right to receive a government benefit, government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."); *Shapiro v. Thompson*, 394 U.S. 618 (1968). In this regard, we note that Congress has conferred upon newspapers the benefit of certain exemptions from the antitrust laws without also claiming the ability to regulate the content of the matters reported in those newspapers. *See* 15 U.S.C. §§ 1801-04.

Moreover, the fact that government may license broadcasters to use frequencies in order to minimize interference, and thus to maximize the effective dissemination of speech through the electromagnetic spectrum, does not justify content regulation. As Judge Bork noted:

> A publisher can deliver his newspapers only because government provides streets and regulates traffic on the streets by allocating rights of way. Yet no one would contend that the necessity for these governmental functions, which are certainly analogous to the government's function in allocating broadcast frequencies, would justify regulation of the content of a newspaper to ensure that it serves the needs of the citizens.

TRAC v. FCC, 801 F.2d at 509. We see no reason why the grant of a broadcast license by the government should also give rise to its ability to control the content of broadcasters' speech. In other words, allocational scarcity does not justify government regulation in violation of constitutional rights.

of government intervention into the editorial process of the press (whether print or electronic) and the right of individuals to receive political viewpoints unfettered by government interference are not changed because the electromagnetic spectrum (or any other resource necessary to convey expression) is scarce or because the government (in conjunction with the marketplace) allocates that scarce resource.[202] Indeed, the fact that government is involved in licensing is all the more reason why the First Amendment protects against government control of content.[203]

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[202]We note that during World War II, for example, the government rationed the supply of newsprint and other scarce resources, but that allocation did not give rise to the government's content-based regulation of the print media. *See generally Supplies for a Free Press: Hearings Before the Subcomm. on Newsprint of the Senate Select Comm. on Small Business*, 82d Cong., 1st Sess. (1951). Indeed, the scarcity of newsprint extended throughout the war and well into the post-war period. During this time, many papers, especially dailies, were forced by circumstances to adopt such practices as circulation freezing, size reduction, and switching to weekly publication. Indications are that the shortage of newsprint due to government rationing caused many smaller newspapers to go out of business, in addition to creating a substantial barrier to those who desired entry into newspaper publishing. Yet the policy of newsprint allocation under government auspices, which caused a reduction in the overall amount of newspaper speech—due either to those who left or those who could not enter—did not give rise to the imposition of obligations on the remaining newspapers to make their facilities available for those speakers who were silenced. *See id.*

The Founding Fathers themselves were apparently well aware of the problems associated with scarcity in the print media. The great "paper famine," for example, occurred during the Revolutionary War when the colonies were cut off from their principal suppliers. *Id.* The existence of this scarcity, however, did not appear to affect the founders' decision to accord the press the full measure of editorial control guaranteed by the First Amendment.

[203]The ability of government to control the content of individuals' speech is particularly disturbing when the government must also license those who wish to speak, because the potential for chilling speech beyond the proper scope of government concern—intentionally or unintentionally—is greater. This is a concern that carries into licensing schemes in other con-

81. On the other hand, the fact that government may not impose unconstitutional conditions on the receipt of a public benefit does not preclude the Commission's ability, and obligation, to license broadcasters in the public interest, convenience and necessity. The Commission may still impose certain conditions on licensees in furtherance of this public interest obligation. Nothing in this decision, therefore, is intended to call into question the validity of the public interest standard under the Communications Act.

82. Rather, we simply believe that, in analyzing the appropriate First Amendment standard to be applied to the electronic press, the concept of scarcity—be it spectrum or numerical—is irrelevant.[204] As Judge Bork stated in *TRAC v. FCC*, "Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion."[205] Consequently, we believe that an

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texts, see supra note 200, and stems from the belief that "government must remain neutral in the marketplace of ideas." *FCC v. Pacifica Foundation*, 438 U.S. at 745. Broadcast licensees must deal routinely with the government on matters wholly unrelated to the content of their broadcasts. They necessarily will want to avoid any conflict with the government in handling these routine matters and, therefore, are especially susceptible to the roving eye of the government, which many times may act in an informal and unofficial manner. The relationship can be precarious even if the government has no express authority to regulate the content of speech. The grant of that express authority, however, can upset the already delicate balance that exists between the government and a free press. *See Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397, 407-10 (D.C.Cir.1975) (Bazelon, J., dissenting from denial of rehearing).

[204]That spectrum scarcity should be irrelevant for First Amendment purposes does not affect its relevance to the Commission's allocational and licensing function. The Commission, of necessity, considers spectrum scarcity in making its allocational and licensing decisions. *See supra* note 197.

[205]*TRAC v. FCC*, 801 F.2d at 508.

evaluation of First Amendment standards should not focus on the *physical differences* between the electronic press and the printed press, but on the *functional similarities* between these two media and upon the underlying values and goals of the First Amendment. We believe that the function of the electronic press in a free society is identical to that of the printed press and that, therefore, the constitutional analysis of government control of content should be no different.[206] With this mind, we return to the *Red Lion* decision and consider its divergence from traditional First Amendment precepts protecting the role of the press in a democratic society.

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[206]There are those who argue that the content of broadcasters' speech may be regulated by the government because of the impact that broadcasters can have on listeners and viewers. These proponents contend that broadcasting is a far more powerful means of communication than the printed press, and, therefore, the public should be protected from those who use the broadcast medium. We will assume for the sake of argument that broadcasters have greater "impact" than their counterparts in the print media, but we nevertheless reject the impact argument. We do not believe that the expression of speech may be regulated by government, consistent with the First Amendment, on the basis of the effectiveness of that expression. *Cf. First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1975). In fact, the rationale of the First Amendment counsels the exact opposite conclusion: the greater the effectiveness of certain speech, the more reason, given the First Amendment's presumption against government control of the press, why government should be prohibited from interfering with the ideas conveyed by such speech.

This conclusion was supported by Justice William O. Douglas, who aptly stated in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 152 n. 3:

> The implication that the people of the country—except the proponents of the theory—are mere unthinking automatons manipulated by the media, without interests, conflicts, or prejudices is an assumption which I find quite maddening. The development of constitutional doctrine should not be based on such hysterical overestimation of media power and underestimation of the good sense of the American public.

See also 1985 Fairness Doctrine, 102 FCC 2d at 221-25.

3. Divergence of *Red Lion* from Traditional First Amendment Precepts

83. We believe that the articulation of lesser First Amendment rights for broadcasters on the basis of the existence of scarcity, the licensing of broadcasters, and the paramount rights of listeners[207] departs from traditional First Amendment jurisprudence in a number of respects.[208] Specifically, the Court's decision that the listeners' rights justifies government

[207]Justice Douglas, who did not participate in the *Red Lion* decision, later stated that he would not have supported the Court's conclusion that the fairness doctrine did not violate the First Amendment. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 154. He explained:

> the prospect of putting government in a position of control over publishers is to me an appalling one, even to the extent of the Fairness Doctrine. The struggle for liberty has been a struggle against Government. The essential scheme of our Constitution and Bill of Rights was to take government off the backs of people. . . . [I]t is anathema to the First Amendment to allow Government any role of censorship over newspapers, magazines, books, art, music, TV, radio, or any other aspect of the press. There is unhappiness in some circles at the impotence of government. But if there is to be a change, let it come by constitutional amendment. The Commission has an important role to play in curbing monopolistic practice, in keeping channels free from interference, in opening up new channels as technology develops. But it has no power of censorship.

Id. at 162.

[208]The Court may have implicitly recognized this departure when, five years later in *Tornillo*, it struck down a statute applicable to newspapers that was similar to the fairness doctrine without ever mentioning or citing *Red Lion*. The Court of Appeals has stated that "[d]espite [the] holding [in *Red Lion*], important constitutional questions continue to haunt this area of the law. The doctrine and the rule do, after all involve the government to a significant degree in policing the content of communication. There are abiding First Amendment difficulties." *Straus Communications Inc. v. FCC*, 530 F.2d 1001, 1008 (D.C.Cir.1976). *TRAC v. FCC*, 801 F.2d at 506-09.

intrusion appears to conflict with several fundamental principles underlying the constitutional guarantee of free speech.

84. First, this line of decisions diverges from Supreme Court pronouncements that "the First Amendment 'was fashioned to assure *unfettered* interchange of ideas for the bringing about of political and social changes desired by the people.'"[209] The framers of that Amendment determined that the best means by which to protect the free exchange of ideas is to prohibit any governmental regulation which "abridg[es] the freedom of speech or of the press."[210] They believed that the marketplace of ideas is too delicate and too fragile to be entrusted to governmental authorities.

85. In this regard, Justice Potter Stewart once stated that "[t]hose who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that 'fairness' was far too fragile to be left for a government bureaucracy to accomplish."[211] In the same vein, Justice Byron White has stated that:

> Of course, the press is not always accurate, or even responsible, and may not present full and fair debate on important public issues. But the balance struck by the First Amendment with respect to the press is that society must take the risk that occasionally debate on vital matters will not be comprehensive and that all viewpoints may not be expressed.... Any other accommodation—any other system that would supplant private control of the press with the heavy hand of government intrusion—would make the

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[209] *Connick v. Myers*, 461 U.S. 138, 145 (1983), quoting *Roth v. United States*, 354 U.S. 476, 484 (1957) (emphasis added); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

[210] U.S. CONST. amend. I.

[211] *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 145-46 (Stewart, J., concurring).

> government the censor of what the people may read and know.[212]

Indeed, the Supreme Court has often emphasized that:

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.[213]

Consequently, a cardinal tenet of the First Amendment is that governmental intervention in the marketplace of ideas of the sort involved in the enforcement of the fairness doctrine is not acceptable and should not be tolerated.

86. The fairness doctrine is at odds with this fundamental constitutional precept. While the objective underlying the fairness doctrine is that of the First Amendment itself—the promotion of debate on important controversial issues—the means employed to achieve this objective, government coercion, is the very one which the First Amendment is designed to prevent.[214] As the Supreme Court has noted, "By protect-

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[212]*Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 260 (1974) (White, J., concurring) ("*Tornillo*").

[213]*Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940) (footnote omitted) (emphasis added), quoted in *FCC v. League of Women Voters of California*, 468 U.S. at 381-82. *Accord First National Bank of Boston v. Bellotti*, 435 U.S. 765, 766 (1978); *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530, 534-35 (1980).

[214]It is well established that the mere invocation of a laudatory regulatory objective, by itself, does not demonstrate the constitutionality of a governmental regulation. *See, e.g., Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1454 (D.C.Cir.1985), *cert. denied*, 106 S.Ct. 2889 (1986). Indeed, the Supreme Court, in both *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 106 S.Ct. 903 (1986), and *Tornillo*, declared unconstitutional state action, in the context of printed material, which was designed to further the same governmental purpose underlying the fairness doctrine. *See infra* 95.

ing those who wish to enter the marketplace of ideas from governmental attack, the First Amendment protects the public's interest in receiving information."[215] Yet the fairness doctrine uses government intervention in order to foster diversity of viewpoints, while the scheme established by the framers of our Constitution forbids government intervention for fear that it will stifle robust debate. In this sense, the underlying rationale of the fairness doctrine turns the First Amendment on its head.

87. Indeed, even when approving the doctrine in the *1974 Fairness Report*, the Commission recognized the anomaly of a policy which purports to further First Amendment values by the very mechanism proscribed by that constitutional provision. In that Report, the Commission explained that:

> th[e] [doctrine's] affirmative use of government power to expand broadcast debate would seem to raise a striking paradox, for freedom of speech has traditionally implied an absence of governmental supervision or control. Throughout most of our history, the principal function of the First Amendment has been to protect the free marketplace of ideas by precluding governmental intrusion.[216]

88. The *Red Lion* decision also is at odds with the well-established precept that First Amendment protections are especially elevated for speech relating to matters of public concern, such as political speech and other matters of public importance. Indeed, the Supreme Court, in the context of broadcast regulation, recently stated that the expression of opinion on matters of public concern is "entitled to the most exacting

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[215] *Pacific Gas & Electric Co. v. Public Utility Commission of California*, 106 S.Ct. at 907.

[216] *1974 Fairness Report*, 48 FCC 2d at 3.

degree of First Amendment protection."[217] The Court has recognized that this type of speech is "indispensible to decisionmaking in a democracy."[218] As the Court has stated, "speech concerning public affairs is more than self-expression; it is the essence of self-government."[219] Because it is the people in a democratic system who "are entrusted with the responsibility for judging and evaluating the relative merits of

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[217]*FCC v. League of Women Voters of California*, 468 U.S. at 375-76 (citation omitted). *See, e.g., Philadelphia Newspapers, Inc. v. Hepps*, 106 S.Ct. 1558, 1565 (1986); *Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S.Ct. 2939, 2945-46 (1985), quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978), quoting *Thornhill v. Alabama*, 310 U.S. at 101 ("It is speech on 'matters of public concern' that is "at the heart of the First Amendment protection."); *Connick v. Myers*, 461 U.S. at 145, quoting *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 913 (1982) ([T]he Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values.'. . .).

[218]*First National Bank of Boston v. Bellotti*, 435 U.S. at 777. The Court explained that:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."

New York Times Co. v. Sullivan, 376 U.S. at 269, quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931).

[219]*Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). As a plurality of the Supreme Court recently stated, "[t]he constitutional guarantee of free speech 'serves significant societal interests' wholly apart from the speaker's interest in self-expression. By protecting those who wish to enter the marketplace of ideas from governmental attack, the First Amendment protects the public's interest in receiving information." *Pacific Gas & Electric Co. v. Public Utility Commission of California*, 106 S.Ct. at 907, quoting *First National Bank of Boston v. Bellotti*, 435 U.S. at 776. "The individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion, although the two often converge." *First National Bank of Boston v. Bellotti*, 435 U.S. at 777 n. 12.

conflicting arguments,"[220] the "[g]overnment is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves."[221]

89. The type of speech regulated by the fairness doctrine involves opinions on controversial issues of public importance. This type of expression is "precisely that ... which the Framers of the Bill of Rights were most anxious to protect—speech that is 'indispensible to the discovery and spread of political truth' . . . ."[222] Yet, instead of safeguarding this type of speech from regulatory intervention, the doctrine anomalously singles it out for governmental scrutiny.

90. Further, the Red Lion decision cannot be reconciled with well-established constitutional precedent that governmental regulations directly affecting the content of speech are subjected to particularly strict scrutiny.[223] The Supreme Court has emphasized that "[i]f the marketplace of ideas is to remain free and open, governments must not be allowed to choose 'which issues are worth discussing or debating. . . .'"[224] As noted above, enforcement of the fairness doctrine not only forces the government to decide whether an issue is of

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[220]*First National Bank of Boston v. Bellotti*, 435 U.S. 765, 791 (1977).

[221]*Id.* at 792 n. 31 (citations omitted). *Consolidated Edison Co. of New York, Inc. v. Public Utility Commission of New York*, 447 U.S. 530 (1980).

[222]*FCC v. League of Women Voters of California*, 468 U.S. at 383, quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[223]*See, e.g., FCC v. League of Women Voters of California*, 468 U.S. at 383- 84; *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984); *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). *Compare, e.g., Tornillo, supra* note 192, with *United States v. O'Brien*, 391 U.S. 367 (1968).

[224]*Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. at 537-38, quoting *Police Department of Chicago v. Mosley*, 408 U.S. at 96 (ellipsis in original).

"public importance," but also whether the broadcaster has presented "significant" contrasting viewpoints. Unorthodox minority viewpoints do not receive favored treatment as do their "significant" counterparts. As the Court recently asserted, "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."[225]

91. The difference in the *Red Lion* approach becomes apparent when considering the validity of the fairness doctrine. The fairness doctrine indisputably regulates the content of speech. Like the statute invalidated in *FCC v. League of Women Voters of California*, "enforcement authorities must necessarily examine the content of the message that is conveyed to determine whether the views expressed concern 'controversial issues of public importance.'"[226] Yet even in the *League* case, the Court applied a standard that the regulation be narrowly tailored to achieve a substantial government interest, a standard traditionally reserved for content-neutral regulations.[227] In contrast, a traditional First Amendment

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[225]*Regan v. Time, Inc.*, 468 U.S. 641, 649 (1984). *See also Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1982), quoting *New York Times v. Sullivan*, 376 U.S. at 270 ("Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' "). *Accord Carey v. Brown*, 447 U.S. 462, 463 (1980). The Court of Appeals, in the context of broadcast regulation, has asserted that "[t]he First Amendment is unmistakeably hostile to governmental controls over the content of the press." *Banzhaf v. FCC*, 405 F.2d 1082, 1100 (D.C.Cir.1968) (footnote omitted), *cert. denied*, 396 U.S. 842 (1969).

[226]*FCC v. League of Women Voters of California*, 468 U.S. at 383 (quotation omitted).

[227]*See, e.g., Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984). In *Renton v. Playtime Theatres, Inc.*, 106 S.Ct. 925 (1986), the Supreme Court determined that an ordinance which imposed more stringent zoning restrictions upon adult theaters than upon other kinds

analysis would require a content-based regulation, such as the fairness doctrine, to be a "precisely drawn means of serving

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of theaters was not a content-based regulation. The purpose of the ordinance was to avoid urban blight and preserve the quality of urban life, and thus the Court found the ordinance to be "justified without reference to the content of speech." *Id.* at 929 (emphasis and quotation omitted). In *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 106 S.Ct. 903 (1986)—a case decided on the same day as *Renton*—the Court invalidated a regulation that required a utility which disseminated political editorials to publish the views of its opponent as well. The plurality determined that the regulation at issue in that case was content-based because it "discriminates on the basis of the viewpoints of the selected speakers." *Id.* at 910. It explained that the governmental purpose "in exposing [ratepayers] to a variety of viewpoints is not ... content- neutral." *Id.* at 914. Thus, the Supreme Court has distinguished between content-neutral governmental actions, like the ordinance in *Renton*, whose justification was found to be unrelated to the content of speech and content- based regulations, like the one invalidated in *Pacific Gas & Electric*.

The fairness doctrine is clearly content-based. Fairness doctrine obligations do not attach to every discussion or even to those involving a controversial issue of public importance. The doctrine is implicated only where the speaker expresses an opinion on a controversial issue of public importance. Furthermore, as stated earlier, the fairness doctrine differentiates between "major" or "significant" opposing viewpoints, which qualify for coverage under the second part of the doctrine, and those opinions that are not sufficiently significant to trigger responsive programming obligations. As a consequence, in administering the doctrine, the Commission "inexorably favors orthodox viewpoints" over those which may be unpopular or unestablished. *1985 Fairness Report*, 102 FCC 2d at 188. The fairness doctrine is very different from governmental actions such as the mandatory carriage rules for cable television operators *Carriage of Television Broadcast Signals by Cable Television Systems*, 1 FCC Rcd 864 (1986), *recon. denied*, FCC 87-105 (May 1, 1987), *petition for review docketed sub nom. Turner Broadcasting System, Inc. v. FCC*, No. 86-1682 (D.C.Cir. filed December 12, 1986), the justification for which is unrelated to the content of speech and which do not distinguish among classes of speakers on the basis of the subject matter of their expression. Simply stated, where viewpoint is the trigger of government- imposed obligations, those obligations cannot be considered content-neutral.

a compelling state interest."[228] Even under a traditional approach, therefore, content-based regulations are not necessarily invalid, but they are subject to a much higher standard of review than the one applicable to the broadcast media.

92. Because the dissemination of a particular viewpoint by a broadcaster can trigger the burdens associated with broadcasting responsive programming, the doctrine directly penalizes—through the prospect or reality of government intrusion—the speaker for expressing his or her opinion on a matter of public concern.[229] For even if the broadcaster has, in fact, presented contrasting viewpoints, the government, at the request of a complainant, may nevertheless question the broadcaster's presentation, which in and of itself is a penalty for simply covering an issue of public importance.

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[228] *Consolidated Edison v. Public Service Comm'n*, 447 U.S. 530, 540 (1980).

[229] In certain cases, the doctrine may compel a speaker actively to publish opinions that are directly contrary to his or her own, and on which he or she would prefer to remain silent. The Supreme Court has emphasized that coercing a person to disseminate particular opinions is contrary to fundamental First Amendment guarantees. The Court explained that:

> [T]he right of freedom of thought protected by the First Amendment ... includes both the right to speak freely and the right to refrain from speaking at all. A system which secures the right to proselytize religious, political and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind."

Wooley v. Maynard, 430 U.S. 705, 714 (1977), quoting *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 637 (1943). The fairness doctrine is thus a government-imposed obligation that "both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set." *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 106 S.Ct. at 908.

93. In this regard, we note that sound journalistic practice already encourages broadcasters to cover contrasting viewpoints on a topic of controversy. The problem is not with the goal of the fairness doctrine, it is with the use of government intrusion as the means to achieve that goal. With the existence of a fairness doctrine, broadcasters who intend to, and who do in fact, present contrasting viewpoints on controversial issues of public importance are nevertheless exposed to potential entanglement with the government over the exercise of their editorial discretion. Consequently, these broadcasters may shy away from extensive coverage of these issues. We believe that, in the absence of the doctrine, broadcasters will more readily cover controversial issues, which, when combined with sound journalistic practices, will result in more coverage and more diversity of viewpoint in the electronic media; that is, the goals of the First Amendment will be enhanced by employing the very means of the First Amendment: government restraint.

94. Finally, we believe that under the First Amendment, the right of viewers and listeners to receive diverse viewpoints is achieved by guaranteeing them the right to receive speech unencumbered by government intervention. The *Red Lion* decision, however, apparently views the notion that broadcasters should come within the free press and free speech protections of the First Amendment as antagonistic to the interest of the public in obtaining access to the marketplace of ideas. As a result, it is squarely at odds with the general philosophy underlying the First Amendment, *i.e.*, that the individual's interest in free expression and the societal interest in access to viewpoint diversity are both furthered by proscribing governmental regulation of speech. The special broadcast standard applied by the Court in *Red Lion*, which sanctions restrictions on speakers in order to promote the interest

of the viewers and listeners, contradicts this fundamental constitutional principle.[230]

4. First Amendment Standard Applicable to the Press

95. Under a traditional First Amendment analysis,[231] the type of governmental intrusion inherent in the fairness doctrine would not be tolerated if it were applied to the print media.[232] Indeed, in *Miami Herald Publishing Co. v. Tornillo*,[233] the Supreme Court struck down, on First Amendment grounds, a Florida statute that compelled a newspaper to print the response of a political candidate that it had criticized. Invoking a purpose strikingly similar to the fairness doctrine, the state had attempted to justify the statute on the grounds that the "government has an obligation to ensure that a wide variety of views reach the public."[234] The Court reasoned that the mechanism employed by the state in implementing this objective, however, was "governmental coercion,"[235] and thus contravened "the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years."[236]The Court also found that a governmentally imposed right of reply impermissibly "intrud[ed] into the function of editors."[237] In addition, the Court stated that the inevitable result of compelling the press "to

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[230]*See 1985 Fairness Report*, 102 FCC 2d at 153 n. 39.

[231]*See supra* 91.

[232]The Supreme Court has specifically noted that the type of governmental regulation sanctioned by *Red Lion* and its progeny "has never been allowed with respect to the print media." *FCC v. League of Women Voters of California*, 468 U.S. at 377 (citation omitted).

[233]418 U.S. 241 (1974).

[234]*Id.* at 248 (footnote omitted).

[235]*Id.* at 254.

[236]*Id.*

[237]*Id.* at 258.

print that which it would not otherwise print"[238] would be to reduce the amount of debate on governmental affairs:

> Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably "'dampens the vigor and limits the variety of public debate.'"[239]

Also, the fact that a newspaper could simply add to its length did not dissuade the Court from concluding that the access requirement would improperly intrude into the editorial discretion of the newspaper.[240]

96. Relying on *Tornillo*, the Court, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*,[241] recently determined that a state administrative order requiring a utility to place the newsletter of its opponents in its billing envelopes contravened the First Amendment.[242] "[B]ecause access was awarded only to those who disagreed with [the utility's] views and who are hostile to [the utility's] in-

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[238]*Id.* at 256.

[239]*Id.* at 257, *quoting New York Times Publishing Co. v. Sullivan*, 376 U.S. at 279. Further, expressly noting that print journalists are not "subject to the finite technological limitations of time that confront a broadcaster ..." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at 256-57, the Court intimated that our regulations may produce even greater inhibitions than the "right to reply" statute invalidated in *Tornillo*.

[240]*See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at 256-57.

[241]106 S.Ct. 903 (1986). *See supra* note 227.

[242]Like the fairness doctrine, the asserted governmental interest underlying the state administrative order was to promote access to diversity of opinions. The Court was unpersuaded that the legitimacy of the asserted governmental "interest in promoting speech by making a variety of views available to appellant's customers," id. at 914 (citation omitted), was sufficient to withstand a First Amendment challenge.

terests,"[243] Justice Lewis Powell, in the plurality opinion, expressed concern that "whenever [the utility] speaks out on a given issue, it may be forced ... to help disseminate hostile views."[244] As a consequence, the regulation had the effect of reducing the free flow of information and ideas that the First Amendment seeks to promote. In evaluating the utility's First Amendment rights to be free from governmentally-coerced speech, the plurality expressly stated that it was irrelevant that the ratepayers, rather than the utility, owned the extra space in the billing envelopes. It asserted that the "forced association with potentially hostile views burdens the expression of views ... and risks forcing [the utility] to speak where it would prefer to remain silent"[245] irrespective of who is deemed to own this extra space.[246]

97. We believe that the role of the electronic press in our society is the same as that of the printed press. Both are sources of information and viewpoint. Accordingly, the reasons for proscribing government intrusion into the editorial discre-

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[243] *Id.* at 910.

[244] *Id.* at 910. The plurality also determined that it was constitutionally impermissible for the state to require the utility "to associate with speech with which [it] may disagree." *Id.* at 911.

[245] Id. at 913.

[246] As the plurality explained:

> A different conclusion would necessarily imply that our decision in *Tornillo* rested on Miami Herald's ownership of the space that would have been used to print candidate replies. Nothing in *Tornillo* suggests that the result would have been different had the Florida Supreme Court decided that the newspaper space needed to print candidates' replies was the property of the newspapers' readers. . . . The constitutional difficulty with the right-of-reply statute was that it required the newspaper to disseminate a message with which the newspaper disagreed.

Id. at 913.

tion of print journalists provide the same basis for proscribing such interference into the editorial discretion of broadcast journalists. The First Amendment was adopted to protect the people not from journalists, but from government. It gives the people the right to receive ideas that are unfettered by government interference. We fail to see how that right changes when individuals choose to receive ideas from the electronic media instead of the print media. There is no doubt that the electronic media is powerful and that broadcasters can abuse their freedom of speech. But the framers of the Constitution believed that the potential for abuse of private freedoms posed far less a threat to democracy than the potential for abuse by a government given the power to control the press. We concur. We therefore believe that full First Amendment protections against content regulation should apply equally to the electronic and the printed press.

IV. CONCLUSION

98. The court in *Meredith Corp. v. FCC* "remand[ed] the case to the FCC with instructions to consider [Meredith's] constitutional arguments."[247] In response to the court's directive, we find that the fairness doctrine chills speech and is not narrowly tailored to achieve a substantial government interest. We therefore conclude, under existing Supreme Court precedent, as set forth in Red Lion and its progeny, that the fairness doctrine contravenes the First Amendment and thereby disserves the public interest. We have reached these determinations only after the most careful and searching deliberations. We believe, however, that the evidence presented in the recent fairness inquiry and the record in this proceeding leads inescapably to these conclusions. Each member of this

[247] *Meredith Corp. v. FCC*, 809 F.2d at 874.

Commission has taken an oath to support and defend the United States Constitution and, as the court in *Meredith v. FCC* stated, "to enforce a Commission-generated policy that the Commission itself believes is unconstitutional may well constitute a violation of that oath."[248] As a consequence, we determine that the editorial decision of station WTVH to broadcast the editorial advertisements at issue in this adjudication is an action protected by the First Amendment from government interference. Accordingly, we reconsider our prior determinations in this matter and conclude that the Constitution bars us from enforcing the fairness doctrine against station WTVH.

99. We further believe, as the Supreme Court indicated in *FCC v. League of Women Voters of California*, that the dramatic transformation in the telecommunications marketplace provides a basis for the Court to reconsider its application of diminished First Amendment protection to the electronic media. Despite the physical differences between the electronic and print media, their roles in our society are identical, and we believe that the same First Amendment principles should be equally applicable to both. This is the method set forth in our Constitution for maximizing the public interest; and furthering the public interest is likewise our mandate under the Communications Act. It is, therefore, to advance the public interest that we advocate these rights for broadcasters.

100. ACCORDINGLY, IT IS ORDERED, that the Motion for Leave to File Comments Out-of-Time of the American Civil Liberties Union and the Motion to Submit Late-Filed Comments filed by the Safe Energy Communication Council ARE GRANTED.

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[248] *Id.*

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101. IT IS FURTHER ORDERED, that the Motion for Leave to File Supplement of Meredith Corporation IS GRANTED and the supplement IS ACCEPTED.

102. IT IS FURTHER ORDERED, that the Petition for Reconsideration filed by Meredith Corporation IS GRANTED to the extent indicated herein, and the Order adopted October 26, 1984 IS VACATED.

103. IT IS FURTHER ORDERED, that the complaint of the Syracuse Peace Council IS DENIED.

104. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.[249]

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico,
Secretary

[249]As in any adjudicatory matter, this Order shall become effective on the day after the day it is released. 47 C.F.R. § 1.4(b).

APPENDIX

List of Commenting Parties

Accuracy-in-Media
American Advertising Federation
American Association of Advertising Agencies
American Civil Liberties Union
American Newpaper Publishers Association
American Society of Newspaper Editors
Anti-Defamation League of B'nai B'rith
Bronet, Lester Charles
Bunch, Virginia
CBS, Inc. ("CBS")
Caruso, Rita M.
Cester, Judith
Demaree, Patrick
DeJager, Everett
Democratic National Committee,
Democratic Congressional Campaign Committee, and
Democratic Senatorial Campaign Committee
Dowd, Diane
Ellis, Houston
Erikson, Michael
Fisher Broadcasting
Freedom of Expression Foundation ("FEF")
Group W
Holthaus, Robert
Jansa, M.A.
Jenkinson, Stanley
Landmark Legal Foundation
Meredith Corp. ("Meredith')

National Association of Broadcasters ("NAB")
NBC, Inc.

New York State Consumer Protection Board
Office of Communications of the United Church of Christ;
Communication Commission, National Council of
Churches; Henry Geller and Donna Lampert
Pomery, June S.
Postrel, Virginia
Radio-Television News Directors Association (RTNDA),
CBS, NAB, FEF, Gannett Co., Inc. (Gannett), Gaylord
Brodcasting Co. (Gaylord), Meredith, Multimedia, Inc.,
Post-Newsweek Stations, Inc. and Society of Professional
Journalists, Sigma Delta Chi
RTNDA, Gannett, and Gaylord
Rochester Committee for Broadcasting
Safe Energy Communication Council
Schultz, Connie
Spielberg, Sol
Speech Communications Association
Spitzer, Jack
Swartsel, Laura
Syracuse Peace Council
Thiel, Paul
Thurston, Helen
United States Catholic Conference
Villadsen, LA.
Vroon, Peter

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of
SYRACUSE PEACE COUNCIL
against
TELEVISON STATION WTVH
Syracuse, New York

MEMORANDUM OPINION AND ORDER
Adopted: March 24, 1988; Released: April 7, 1988

By the Commission:

1. On August 4, 1987, the Commission responded to the remand decision of the United States Court of Appeals in *Meredith Corp. v. FCC*[1] by concluding that the fairness doctrine, on its face, violated the first amendment and contravened the public interest.[2] Accordingly, the Commission vacated its earlier order,[3] in which it had determined that Meredith Corporation, licensee of television station WTVH in Syracuse, New York, had violated the fairness doctrine, and terminated the proceeding.

2. Now before the Commission are: (1) a Petition for Reconsideration of Geller and Lampert filed September 1, 1987, by

[1]809 F.2d 863 (D.C.Cir.1987).

[2]*Syracuse Peace Council*, 2 FCC Rcd 5043 (1987). The fairness doctrine imposed a two-part obligation on broadcast licensees. First, it affirmatively required broadcasters to cover vitally important controversial issues of interest in their communities. Second, it obligated them to provide a reasonable opportunity for the presentation of contrasting viewpoints on any controversial issue of public importance that they, in fact, covered. *Id.* at 5058-59 n. 2.

[3]*Syracuse Peace Council*, 99 FCC2d 1389 (1984), recon. denied, 59 RR2d 179 (1985).

Henry Geller and Donna Lampert ("Geller and Lampert"); (2) a Petition of Freedom of Expression Foundation for Partial Reconsideration of Order filed September 3, 1987, by Freedom of Expression Foundation, Inc. ("FEF"); (3) a Partial Opposition to Petition for Reconsideration of Geller and Lampert filed September 11, 1987, by Telecommunications Research and Action Center ("TRAC") and Syracuse Peace Council ("SPC"); (4) an Opposition of Meredith Corporation to Petition for Reconsideration of Geller and Lampert filed September 16, 1987, by Meredith Corporation ("Meredith"); (5) an Opposition to Petition for Reconsideration of Geller and Lampert filed September 16, 1987, by the Radio-Television News Directors Association ("RTNDA"); (6) an Opposition of People for the American Way to Petition of Freedom of Expression Foundation for Partial Reconsideration of Order filed September 16, 1987, by People for the American Way ("PFAW"); (7) an Opposition of CBS Inc. to Petition for Reconsideration of Geller and Lampert filed October 23, 1987, by CBS Inc. ("CBS"); (8) an Opposition to Petitions for Reconsideration and Clarification filed October 26, 1987, by the Office of Communication of the United Church of Christ and the Communications Commission of the National Council of Churches ("UCC"); and (9) a Reply of Geller and Lampert to Oppositions filed November 9, 1987, by Geller and Lampert. These pleadings relate to the Commission's August memorandum opinion and order in this proceeding.[4]

I. BACKGROUND

3. In 1984, the Commission determined that television station WTVH had violated the fairness doctrine by broadcasting a series of editorial advertisements advocating the construc-

[4]The Commission invited public comment on the Geller and Lampert and the FEF petitions. 52 Fed.Reg. 36,630 (Sept. 30, 1987).

tion of the Nine Mile Point II nuclear plant as a sound investment for New York without providing a reasonable opportunity for the presentation of contrasting viewpoints on that issue.[5] The Commission denied reconsideration of that determination, despite Meredith's assertion, among others, that enforcement of the doctrine—on its face, and as applied in this case—violated the first amendment.[6] Instead, the Commission concluded that Meredith's constitutional arguments were more appropriately considered by the courts or Congress, and, therefore, it declined to rule on them.[7]

4. On appeal, the United States Court of Appeals for the District of Columbia Circuit remanded the case, concluding that the Commission's failure to address Meredith's constitutional arguments was "the very paradigm of arbitrary and capricious administrative action."[8] Noting that another panel of that court had determined that the fairness doctrine was not codified in the Communications Act,[9] or otherwise mandated by congressional action,[10] the court held that the Commission was not free "to ignore a constitutional challenge to the application of its own policy merely because the resolu-

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[5]*Syracuse Peace Council*, 99 FCC2d 1389 (1984), recon. denied, 59 RR2d 179 (1985), remanded sub nom., *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C.Cir.1987).

[6]*Syracuse Peace Council*, 59 RR2d 179 (1985). Because facts later presented to the Commission showed that Meredith had subsequently broadcast contrasting viewpoints on the relevant issue, the Commission determined not to impose any sanction on *Meredith*. *Id.* at 184-85. The Commission, however, refused to vacate its original order finding a fairness doctrine violation, because its finding of a violation had been correct at the time, based on the evidence then before it.

[7]*Id.* at 182 n. 4.

[8]*Meredith Corp. v. FCC*, 809 F.2d at 874.

[9]*Telecommunications Research and Action Center v. FCC*, 801 F.2d 501 (D.C.Cir.1986), cert. denied, 107 S.Ct. 3196 (1987).

[10]*Meredith Corp. v. FCC*, 809 F.2d at 873 n. 11.

tion would be politically awkward."[11] It therefore remanded this case with instructions to consider Meredith's constitutional arguments, unless, in the alternative, the Commission determined that continued enforcement of the fairness doctrine was no longer in the public interest.[12]

5. In its August 1987 decision on remand, the Commission held that, "under the constitutional standard established by *Red Lion [Broadcasting Co. v. FCC]*[13] and its progeny, the fairness doctrine contravenes the First Amendment and its enforcement is no longer in the public interest."[14] Because the policy and constitutional considerations in the case were inextricably intertwined, the Commission determined that it could not address the constitutional issues separately from the policy issues.[15] It also decided to consider the constitutionality of the doctrine "on its face," because there was no sound, justifiable basis for limiting its decision to the constitutionality of the doctrine "as applied" in this case.[16] Finally, the Commission determined that it could reach the issue of the doctrine's constitutionality in this adjudicatory proceeding and was not obligated to institute a rulemaking proceeding in order to address the court's instructions on remand.[17]

6. Addressing the merits of Meredith's constitutional arguments, the Commission determined that the fairness doctrine was unconstitutional under the first amendment standard established by *Red Lion* and its progeny. More specifically, the Commission held that, because of the identified chilling

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[11] *Id.* at 874.

[12] *Id.*

[13] 395 U.S. 367 (1969).

[14] *Syracuse Peace Council*, 2 FCC Rcd at 5052 ¶ 61.

[15] *Id.* at 5045-46 ¶ 17-22.

[16] *Id.* at 5047-48 ¶ 27-35.

[17] *Id.* at 5046-47 ¶ 23-26.

effect caused by the doctrine's enforcement,[18] "the overall net effect of the doctrine is to reduce the coverage of controversial issues of public importance, in contravention of the standard announced in *Red Lion*." [19] The Commission relied on the Supreme Court's statement in *Red Lion* that it would reconsider its holding that the fairness doctrine was constitutional "if experience with the administration of [the doctrine] indicates that [it] ha[s] the net effect of reducing rather than enhancing the volume and quality of coverage [of controversial issues of public importance]."[20] Furthermore, the Commission concluded that "[b]ecause the fairness doctrine imposes substantial burdens upon the editorial discretion of broadcast journalists and, because technological developments have rendered the doctrine unnecessary to ensure the public's access to viewpoint diversity, it is no longer narrowly tailored to meet a substantial government interest and therefore violates the standard set forth in *[FCC v.] League of Women Voters.*"[21] Consequently, the Commission granted reconsideration and vacated its earlier order determining that Meredith had violated the fairness doctrine.[22]

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[18]*See id.* at 5049-50 ¶¶ 42-51; see also *Inquiry Into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 FCC 2d 143, 169-90 (1985) [hereinafter cited as *1985 Fairness Report*].

[19]*Syracuse Peace Council*, 2 FCC Rcd at 5050 ¶ 51.

[20]*Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 391; see also *FCC v. League of Women Voters of California*, 468 U.S. 364, 378 n. 12 (1984).

[21]*Syracuse Peace Council*, 2 FCC Rcd at 5052 ¶ 60, citing *FCC v. League of Women Voters of California*, 468 U.S. at 380 (regulations of broadcast speech must be "narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues").

[22]In *dictum* to the decision, the Commission urged the Supreme Court to revisit and to revise the current first amendment approach to evaluating content regulations of broadcast speech under *Red Lion*. *Syracuse Peace Council*, 2 FCC Rcd at 5052-57 ¶¶ 62-97. The Commission advocated

II. THE FREEDOM OF EXPRESSION FOUNDATION PETITION

7. In its petition, FEF asks the Commission to reconsider footnote 75 of the August order, in which the Commission noted, "[W]e need not—and do not—decide here what effect today's ruling will have on every conceivable application of the fairness doctrine."[23] FEF argues that the Commission, in this proceeding, should specifically determine that continued enforcement of the personal attack rule[24] and the political editorial rule,[25] which FEF characterize as "direct progeny of the fairness doctrine," also violates the first amendment.

8. We deny the FEF petition to the extent that it requests us to consider the continued validity of the personal attack and political editorial rules in this proceeding. Because this adjudicatory proceeding did not involve the application of either of those rules, we do not believe, as FEF asserts, that it is arbitrary and capricious for us to decline to address them here. Those issues are beyond the scope of this proceeding. We note that after the release of the August order, the Commission received a Joint Petition for Expedited Rulemaking Action and for Clarification of Memorandum Opinion and Order Ending Enforcement of the Fairness Doctrine filed August 25, 1987, by the Radio-Television News Directors Association and others. This petition requests the Commission either to conclude the rulemaking proceeding currently outstanding with respect to the personal attack and political editorial rules[26]

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the application of traditional first amendment principles in the evaluation of such speech regulations. *Id.* Petitioners do not request reconsideration of this portion of the Commission's decision.

[23] *Id.* at 5063 n. 75.

[24] 47 C.F.R. § 73.1920.

[25] 47 C.F.R. § 73.1930.

[26] *Repeal or Modification of the Personal Attack and Political Editorial Rules*, 48 Fed.Reg. 28,295 (June 21, 1983).

or to clarify the August order, concluding that those rules will no longer be applied to radio and television licensees. On September 23, 1987, the Commission released a public notice inviting public comment on this petition, and the matter is now pending before the agency. We believe that FEF's arguments are appropriately considered separately and not in the proceeding now before us. We therefore refer FEF's petition to that separate proceeding.[27]

III. THE GELLER AND LAMPERT PETITION

A. Introduction and Summary

9. Geller and Lampert urge us to reconsider our August order on several grounds. First, they argue that the Commission erred in abandoning the fairness doctrine, because, they contend, the enforcement of the doctrine is mandated by the Communications Act. Second, they argue that the Commission erred in determining not to enforce the fairness doctrine without first considering and then adopting an alternative means of enforcing the doctrine. Specifically, they urge the Commission to adopt their proposed alternative of implementing a malice test in the contemporaneous, case-by-case enforcement of the doctrine.[28] Geller and Lampert assert that this approach presents a means of enforcing the doctrine that

[27]To the extent that the pleadings of PFAW and UCC raise issues that are relevant to our August order, we will consider those issues here. Otherwise, we will consider PFAW's arguments regarding FEF's petition for partial reconsideration, and UCC's arguments regarding the RTNDA petition on the personal attack and political editorial rules, in connection with the separate proceeding discussed above. 3 FCC Rcd. 2035 (1988).

[28]According to Geller and Lampert, under a malice test, the Commission would find a violation of the fairness doctrine only if it determined that a licensee acted in deliberate violation of the doctrine, thereby exhibiting bad faith, or that the licensee demonstrated a pattern of acting in reckless disregard for the doctrine's requirements.

is less intrusive than the Commission's previous method. Finally, Geller and Lampert argue that the Commission erred in eliminating its enforcement of the first prong of the fairness doctrine[29] and that, in fact, the Commission should increase its enforcement of the first prong in conjunction with its enforcement of the malice alternative.

10. Several parties support the Geller and Lampert petition,[30] although TRAC, SPC and UCC oppose the malice approach proposed by Geller and Lampert as an inadequate alternative to the previous enforcement of the fairness doctrine. Instead, they argue that the Commission should reinstate the fairness doctrine as previously enforced. Otherwise, these parties fully support the Geller and Lampert petition.

11. In opposition to the Geller and Lampert petition, Meredith Corporation, RTNDA and CBS urge us to deny reconsideration of the August order. Specifically, RTNDA argues that the Court of Appeals decision in *Telecommunications Research and Action Committee v. FCC*[31] definitively held that the fairness doctrine is not codified in the Communications Act and that the Court's decision in *Meredith* held that the FCC could not avoid Meredith's challenge by concluding that the doctrine was codified. RTNDA also asserts that the Commission did, in fact, consider alternatives to the fairness doctrine and concluded that no alternative was satisfactory. Together with CBS, RTNDA argues that the malice alternative proposed by Geller and Lampert would be unworkable in any event and would still have an unconstitutional chilling effect on broadcasters' coverage of controversial issues of public importance. Finally, RTNDA asserts that the Commission correctly eliminated its enforcement of both prongs of the fairness

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[29]See *supra* note 2.

[30]Generally, these supporters are TRAC, SPC, PFAW and UCC.

[31]801 F.2d 501 (D.C.Cir.1986), cert. denied, 107 S.Ct. 3196 (1987).

doctrine, because the first prong was inseverable from the second. Furthermore, it argues that, because of the first prong's substantial intrusiveness into the editorial process, should not be enforced as a separate policy matter.

12. After fully considering the comments of the parties, we deny the Geller and Lampert petition for reconsideration. We maintain our conclusion that, in light of the *TRAC* and *Meredith* decisions, the fairness doctrine is not mandated by the Communications Act and that the Commission was obligated to consider and to rule on Meredith's constitutional arguments in its defense. Furthermore, because the doctrine was not codified, we were under no legal obligation to consider or to adopt alternatives to the doctrine before ruling on Meredith's claim that the doctrine was unconstitutional as then administered. In any event, in a separate proceeding,[32] we considered and rejected, as constitutionally unsound and contrary to the public interest, alternatives to the doctrine, and we now specifically reject, as constitutionally unsound and contrary to the public interest, the contemporaneous, case-by-case malice approach proposed by Geller and Lampert. Finally, we remain convinced that the fairness doctrine was an inseparable doctrine and that, as such, one component could not be severed from the other without undermining the underlying essence of the doctrine.

B. Codification of the Fairness Doctrine

13. Despite petitioners' assertions to the contrary, the Court of Appeals decision in *TRAC* held that the fairness doctrine

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[32] *Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees*, 2 FCC Rcd 5272 (1987) [hereinafter cited as *Fairness Alternatives Report*].

is not codified in the Communications Act.[33] Consequently, we reject their argument that our August decision was in error because it eliminated a policy codified in the Act. We also deny petitioners' contention that, because (in their view) the fairness doctrine cannot be logically separated from Sections 312(a)(7) and 315 of the Act,[34] our ruling called into question the constitutionality of those sections. We reject, as well, their argument that the doctrine cannot be eliminated without eviscerating our general public interest mandate under the statute. Instead, we emphasize that our action leaves Sections 312(a)(7) and 315, as well as the Act's public interest mandate, intact.

14. The *TRAC* court itself drew the distinction between the fairness doctrine and Sections 312(a)(7) and 315 and upheld our public interest determination not to apply the fairness doctrine to teletext.[35] Likewise, because we determined in this

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[33]Geller and Lampert argue that this Commission should not treat the court's ruling in *TRAC* as dispositive of this issue because the petition for rehearing in that case was denied by a 5-4 vote in favor of granting it, with two judges abstaining. At the same time, petitioners argue that the Supreme Court's denial of certiorari in that case provides no guidance as to the substantive merits of the Court of Appeals decision. Petitioners cannot have it both ways. They cannot argue that a procedural vote of the D.C. Circuit on rehearing has substantive implications for the merits of a panel decision, while also arguing that a procedural vote of the Supreme Court on certiorari does not. Rather, we believe that neither procedural vote has substantive implications for the panel decision in *TRAC*. Consequently, unless either the D.C. Circuit, en banc, or the Supreme Court effectively overrules *TRAC*, we are bound by its holding.

[34]47 U.S.C. §§ 312(a)(7), 315.

[35]*Telecommunications Research and Action Center v. FCC*, 801 F.2d 501 (D.C.Cir.1986), cert. denied, 107 S.Ct. 3196 (1987). The *TRAC* court treated the obligations imposed under Sections 312(a)(7) and 315 and those imposed by the fairness doctrine as distinct. The court reversed the Commission's determination not to require licensees, in the provision of teletext services, to comply with equal opportunity obligations imposed under Section 315 on the grounds that the statute affirmatively mandated such obliga-

proceeding that the doctrine violated the first amendment, its elimination was, *a fortiori*, consistent with, not violative of, our public interest mandate.[36] We believe that elimination of the fairness doctrine will serve the public interest, and we reject petitioners' argument that its elimination vitiates, from a statutory perspective, the Act's public interest mandate. As we stated in our August order, "The Commission may still impose certain conditions on licensees in furtherance of [the Act's] public interest obligation. Nothing in this decision, therefore, is intended to call into question the validity of the public interest standard under the Communications Act."[37] Our August order appropriately considered the continued validity of the fairness doctrine alone and in no way was meant to pass on the constitutionality specifically of Sections 312(a)(7) and 315,[38] or on the constitutionality generally of the Act's public interest mandate.

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tions. On the other hand, it affirmed the Commission's interpretation that the reasonable access provision of Section 312(a)(7) did not obligate licensees to offer candidates access to teletext services. Most importantly, the court upheld the Commission's determination not to require licensees to comply with fairness obligations in the provision of teletext services as a reasonable application of the Commission's own policy in furtherance of the public interest. *Id.*

[36]See *infra* note 57.

[37]*Syracuse Peace Council*, 2 FCC Rcd at 5055 ¶ 81.

[38]Petitioners claim that our decision is inconsistent with the Supreme Court's ruling in *Red Lion*, which specifically upheld the constitutionality of the fairness doctrine, and with the Court of Appeals' decision in *Branch v. FCC*, 824 F.2d 37 (1987), cert. denied, 56 U.S.L.W. 3642 (U.S.1988), which upheld the constitutionality of Section 315 on the basis of *Red Lion*. They argue that, unless the Supreme Court reverses its holding in *Red Lion*, we must defer, as did the *Branch* court, to the Court's ruling on the doctrine's constitutionality. Although we addressed similar arguments in the August order, *Syracuse Peace Council*, 2 FCC Rcd at 5065 n. 104, we repeat here that we reviewed the constitutionality of the fairness doctrine in the context of a factual record developed for that purpose and found it unconstitutional within the confines of *Red Lion*. *Id.* at 5049-52 ¶¶ 36-61. Our action was not inconsistent with the Branch court's deference to *Red*

C. Consideration of Alternatives to the Fairness Doctrine

15. In the same vein, we also reject petitioners' claim that we were legally obligated to consider and to adopt an alternative means of enforcing the fairness doctrine before eliminating the doctrine altogether in the August order. This claim is premised on petitioners' argument that the doctrine is codified in the Communications Act, an argument that we have rejected for the reasons set forth above. Had the doctrine in fact been codified in the Act, we believe that Geller and Lampert would have been correct in asserting that we would have had the legal obligation to construe the doctrine so as to achieve the least restrictive encroachment on broadcasters' first amendment rights consistent with the statutory mandate.[39] We know of no precedent, however, that would require us, in the context of an enforcement proceeding in which a constitutional challenge to our own policy is made, to consider and to adopt an alternative to that policy before

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Lion in upholding the constitutionality of Section 315. Unlike the Commission's review of the constitutionality of the fairness doctrine, the Court of Appeals in *Branch* did not review the constitutionality of Section 315 in the context of an evidentiary record developed for that purpose. Absent a record regarding Section 315, the Court of Appeals appropriately upheld the statute's constitutionality on the basis of *Red Lion*. Moreover, we were specifically directed by the Court of Appeals in *Meredith* to consider the constitutional arguments raised by *Meredith*, unless we were able to conclude, on policy grounds alone, that the fairness doctrine no longer served the public interest. *Meredith Corp. v. FCC*, 809 F.2d at 874. Finally, unlike our review here, which involved an agency-created policy, the *Branch* case involved an express statutory requirement.

[39]Although the Commission may not have the authority to declare an act of Congress unconstitutional, and therefore refuse to enforce it, *see Meredith Corp. v. FCC*, 809 F.2d at 873 n. 11, it has the obligation, no less than courts, to construe its enabling statute in a constitutional manner. *Cf. St. Martin Evangelical Lutheran v. South Dakota*, 451 U.S. 772, 780 (1981) (courts must construe statute, if possible, to avoid raising doubts of its constitutionality); *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (same).

concluding that the challenge has merit. In its petition for reconsideration of our 1984 order, Meredith challenged the constitutionality of the fairness doctrine as then administered.[40] Likewise, the Court of Appeals in remanding this case directed the Commission to consider Meredith's challenge, without requiring any additional consideration of alternatives.[41] In our August order, we simply ruled that the fairness doctrine, as then administered, was unconstitutional and contrary to the public interest. In the context of this enforcement proceeding, we were obligated to go no further.

16. Notwithstanding the above, however, we did in fact consider alternative means of enforcing the fairness doctrine in our separate *Fairness Alternatives Report* to Congress.[42] Among the alternatives considered in that proceeding was a proposal by Geller and Lampert that we entertain fairness doctrine complaints only at renewal time and that we apply a "malice" standard of review to those complaints.[43] Although we agreed with commenters in that proceeding that certain alternatives were "preferable to our current administration and enforcement of the doctrine ... (*e.g.*, applying a 'malice' standard of review to fairness complaints ...)," we never-

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[40]*See* generally "Petition for Reconsideration" dated January 22, 1985, and "Reply to Opposition to Petition for Reconsideration and Supplement" dated April 12, 1985, filed by Meredith Corporation in this proceeding.

[41]*Meredith Corp. v. FCC*, 809 F.2d 863 (D.C.Cir.1987).

[42]*See supra* note 32. In the notice of inquiry that led to the issuance of that report, the Commission stated that "the findings [t]herein may be used in any other pending or new proceeding, as appropriate." *Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees*, 2 FCC Rcd 1532, 1533 ¶ 9 (1987). We, therefore, believe it appropriate to refer to the *Fairness Alternatives Report* in this proceeding. *3 FCC Rcd. 2035 (1988).*

[42]*Fairness Alternatives Report*, 2 FCC Rcd at 5276-77 ¶¶ 36-40, 5378 ¶¶ 48- 53.

theless concluded that none of these alternatives was entirely satisfactory from a constitutional or policy perspective.[44] The Commission concluded, therefore, that "the best alternative to the doctrine and the one that best achieves the First Amendment principles underlying the doctrine, and, consequently, our public interest objectives, would be an unregulated marketplace of ideas."[45] As a result, we declined to recommend to Congress any of the proposed alternatives to the doctrine.[46]

17. Geller and Lampert now propose an alternative that differs from their prior proposal, which we already rejected in the *Fairness Alternatives Report*, only insofar as it seeks to have a malice standard applied in the context of contemporaneous fairness complaints, rather than at renewal time.

18. In opposition to Geller and Lampert's latest proposal, CBS questions how the malice approach on a contemporaneous basis would differ from our prior approach of deferring to broadcasters' reasonable judgments on a case-by-case basis. CBS argues that the malice standard only has meaning if applied at renewal time, after the licensee has established a record of conduct over a period of time to determine whether there has been a pattern of abuse. Determining malice under a case-by-case approach, according to CBS, would be no different from our previous approach of finding licensees in violation of the doctrine only if they had unreasonably exercised their editorial judgment in the matter. In reply, Geller and Lampert assert that their contemporaneous malice approach would be

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[44]*Id.* at 5295 ¶ 171.

[45]*Id.*

[46]*The Fairness Alternatives Report* was intended to inform Congress of the results of the inquiry into alternative means of administration and enforcement of the doctrine, which Congress directed us to undertake pursuant to Pub.L. No. 99-591, § 101(b), 100 Stat. 3341, 3341-67 (1986). *See also* H.R.Rep. No. 1005, 99th Cong., 2d Sess. (1986).

similar to the Commission's current approach in evaluating news distortion cases. This approach would require the introduction of extrinsic evidence that the licensee deliberately violated the doctrine or acted in reckless disregard for the doctrine's requirements. Moreover, the malice standard would take on more meaning over time if there developed a series of fairness violations against a licensee.

19. We reject this alternative as well, because it fails to achieve "the First Amendment principles underlying the doctrine."[47] We are not convinced that Geller and Lampert's proposal is substantially different from their renewal-only approach or from the Commission's previous practice of deferring to licensees' reasonable judgments so as to warrant reconsideration of any of the conclusions reached in either the *Fairness Alternatives Report* or our August order in this proceeding. In the *Fairness Alternatives Report*, we concluded only that a malice standard might reduce the government intrusion into the editorial process associated with the fairness doctrine as administered at that time.[48] We did not conclude, however,

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[47] *Fairness Alternatives Report*, 2 FCC Rcd at 5295 ¶ 171. We reiterate our earlier determination that, in the context of this proceeding, we were under no legal obligation to consider or to adopt alternative means of administering and enforcing the fairness doctrine. *See supra* ¶ 15. We address the merits of petitioners' latest proposal only to re-emphasize our conclusion in the August order that fairness obligations violate the first amendment and are contrary to the public interest. The problem results not so much from the manner in which our rule is enforced, but from the mere threat that the government might enforce a rule requiring a vague and subjective notion of "fairness." In rejecting this latest proposal by Geller and Lampert on the merits, we do not mean to imply that we are obligated to consider every alternative that petitioners can imagine before we can bring this enforcement proceeding to a conclusion.

[48] *Fairness Alternatives Report*, 2 FCC Rcd at 5298 n. 51 ("We agree that by adopting an 'actual malice' standard, as suggested by Geller and Lampert, we would reduce to some degree the extent of government oversight in fairness matters and would accord greater journalistic discretion to broadcasters.").

that such an approach would reduce government intrusion to the extent necessary to eliminate the chilling effect of the doctrine that rendered it unconstitutional under the *Red Lion* standard. Nor are we convinced by petitioners' assertions that this approach would remedy the constitutional deficiencies identified with the fairness doctrine in our *1985 Fairness Report*[49] and our August order.[50] CBS and RTNDA agree

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[49]*See supra* note 18.

[50]Petitioners dispute our findings regarding the doctrine's chilling effect, relying on statements made by some broadcasters that their speech is not chilled by the doctrine and on certain congressional findings reported in H.R.Rep. No. 108, 100th Cong., 1st Sess. (1987), and S.Rep. No. 34, 100th Cong., 1st Sess. (1987). At the outset, we note that the reports cited by petitioners were approved as part of a legislative effort that ultimately failed, and we are uncertain as to the appropriate weight to give to them. In any event, we do not believe that the congressional findings undermine our own findings in this proceeding. As stated in August, the fact that some broadcasters were not chilled by the fairness doctrine does not disprove our finding that the *overall* effect of the doctrine is a net reduction in the coverage of controversial issues of public importance. *Syracuse Peace Council*, 2 FCC Rcd at 5050 ¶ 51. Nor does the lack of chill for some broadcasters dissipate our concern for those broadcasters who were in fact chilled. Furthermore, the congressional findings to the effect that the doctrine has allowed particular speakers to air their viewpoints directly, *e.g.*, H.R.Rep. 3 FCC Rcd. 2035 (1988) No. 108, at 18-19; S.Rep. No. 34, at 27, may demonstrate that, on a number of occasions, the doctrine has resulted in certain *speakers* obtaining direct access to the airwaves, but they do not necessarily prove that the doctrine has increased coverage of controversial issues overall. Those viewpoints may have been covered, in a different manner, through the exercise of broadcasters' editorial judgment, if not through direct expression by particular speakers. We note that the doctrine's primary purpose was not to provide direct access to individuals or groups, but to ideas and diverse viewpoints. *See The Handling of Public Issues under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 FCC 2d 1, 28-31 (1974); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 109, 112-14 (1973). Our *1985 Fairness Report* demonstrated that broadcasters may have covered contrasting ideas and viewpoints, but, nevertheless, provided access to individuals or groups in order to avoid entanglements with the government over fairness—a concern separate

that, although Geller and Lampert's approach would reduce the chilling effects associated with the doctrine, it would still not eliminate them.

20. As stated above, we need not decide here the full extent of any chilling effect resulting from petitioner's latest proposal in order to reaffirm our conclusions in the August order. Nor need we resolve that point in order to decide that petitioners' proposal would not be narrowly tailored to achieve a substantial governmental interest.[51] A crucial holding of our August order was that the threat of government intrusion into broadcasters' editorial decisions resulted in a chilling effect, thereby rendering the fairness doctrine unconstitutional and contrary to the public interest.[52] This effect resulted as much from broadcasters' perception of the doctrine as from

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from meeting the fairness obligation itself. *See, e.g., 1985 Fairness Report*, 102 FCC 2d at 164-65 n. 80. We therefore reaffirm our conclusion in the August order that, so long as there are broadcasters who are indeed chilled by the doctrine, and so long as that chill is not offset by evidence that overall broadcast coverage of controversial issues has materially increased as a result of the doctrine, the doctrine has "the *net effect* of reducing rather than enhancing the volume and quality of coverage" of controversial issues of public importance. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 391 (emphasis added); *Syracuse Peace Council*, 2 FCC Rcd at 5050 ¶ 51. Neither Geller and Lampert nor the congressional reports contain any conclusive evidence that broadcasters have increased their coverage of controversial issues of public importance as a result of the fairness doctrine. Consequently, applying the Red Lion standard, we find the doctrine unconstitutional.

[51] *FCC v. League of Women Voters of California*, 468 U.S. at 380.

[52] *See Syracuse Peace Council*, 2 FCC Rcd at 5056-57 ¶ 93: "The problem is not with the goal of the fairness doctrine, it is with the use of government intrusion as the means to achieve that goal. With the existence of a fairness doctrine, broadcasters who intend to, and who do in fact, present contrasting viewpoints on controversial issues of public importance are nevertheless exposed to potential entanglement with the government over the exercise of their editorial discretion."

the actual implementation of the doctrine.[53] Petitioners' proposal of a malice standard attempt to reduce the level of governmental intrusion, but petitioneers have not presented any additional evidence that would permit us to conclude that their most recent variation of the malice standard would sufficiently lessen the chilling effect on broadcasters to warrant a different conclusion with respect to this basic approach. The difference in its impact on licensees is a matter of degree rather than of kind. Accordingly,we believe that adoption of petitioners' proposal would be inappropriae.[54]

21. Moreover, our August order also held that the existing multiplicity of broadcast outlets allows us to achieve the fairness doctrine's goal of diversity of viewpoints without government intervention.[55] No variation on the fairness doctrine, therefore, is needed to achieve the goal of diversity.

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[53]*See, e.g., The Handling of Public Issues under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 58 FCC 2d 691, 712 n. 22 ("It must again be emphasized that the [doctrine's] adverse impact on speech derives not so much from what the Commission actually does than from the licensee's apprehension of what the Commission might do."), 707 ("[The problem with the doctrine] is not simply that the need for enforced fairness is difficult to determine, but the fact that someone other than the speaker has the task of determining it.") (Comm'r Robinson, dissenting).

[54]In the broadest sense, our view of the fairness doctrine is predicated on the theory, which is a fundamental predicate of the first amendment, that the free speech values associated with open and robust debate are for the benefit of the public at large (and not just a particular speaker). These values are achieved by providing speakers a firm platform from which to articulate their views, rather than by withdrawing such support by punishing speakers who are thought to have expressed viewpoints inappropriately. The Geller and Lampert alternative ignores this basic thesis. Fundamentally, the practical effect of their alternative is not to support the exercise of those speech rights that are the essence of open debate, but to withdraw in some measure the debate from the court of public opinion and to rechannel it to the court of administrative review.

[55]*Syracuse Peace Council*, 2 FCC Rcd at 5050-52 ¶¶ 52-57.

Consequently, this latest proposal does not satisfy our constitutional or policy concerns with the doctrine. We reaffirm our earlier conclusion, expressed both in our August order and in the *Fairness Alternatives Report*, that the best alternative to any content-based regulation[56] that seeks to provide, consistent with the first amendment, viewers and listeners with diverse viewpoints is one that relies on an unregulated marketplace of ideas.[57]

D. Elimination and Enforcement of the First Prong

22. Finally, Geller and Lampert request us to reconsider our decision to discontinue enforcement of the first prong of the fairness doctrine, under which broadcasters were obligated to address vitally important controversial issues. They argue that our August order eliminated that prong without adequate notice and that our reasons for eliminating the requirement are deficient. They contend that, like their contemporaneous malice approach, increased enforcement of the prong is mandated by the Communications Act. We deny petitioners' request.

23. At the outset, it should be noted that the Commission, in the August order, did not hold that the first prong of the

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[56]As noted in the August order, id. at 5070 n. 227, the fairness doctrine is clearly a content-based regulation of broadcast speech. Neither that order nor this reconsideration calls into question the constitutionality of our content- neutral, structural regulations designed to promote diversity.

[57]*See id.* at 5052 ¶¶ 58-61; *Fairness Alternatives Report*, 2 FCC Rcd at 5296¶¶ 171-73. Petitioners' protests that there must be some type of fairness doctrine to protect the public interest from the private interests of broadcasters simply fail to understand the Commission's determination that the public's interest in diversity of information and viewpoint is promoted *most* when broadcasters are free to cover controversial issues of public importance without fear of subsequent governmental intervention. *See also supra* note 54. Our conclusion that the first amendment compels the elimination of the fairness doctrine means, *a fortiori*, that elimination of the doctrine is in the public interest.

fairness doctrine, standing alone, was unconstitutional. Rather, the Commission set forth two reasons why it would no longer enforce the first prong. First, the Commission stated that, because "both parts of the doctrine are interdependent and integral to the overall regulatory scheme [of fairness],"[58] it would not sever the first part of the doctrine and consider only whether to continue enforcement of the second part.[59] Instead, it determined that if the enforcement of the doctrine was unconstitutional, it would discontinue enforcement of the entire doctrine, because the elimination of either part would essentially make the doctrine, as it had developed over the years, a nullity.[60] That is, while the first part of the doctrine might conceivably be enforced as an independent policy matter, it simply would not then be the "fairness doctrine," but a new programming requirement devoid of the essential "fairness" component of the old policy. Analogizing to applicable law regarding the severability of statutes, the Commission concluded that, because of the first prong's interrelation with the second, the first prong fell, as part and parcel of the entire doctrine, once the second prong was determined to be unconstitutional.[61] This result followed regardless of whether the first prong could be lawfully enforced as a separate policy matter.

24. Second, we determined that, even if the two parts of the doctrine were severable, we would not choose, as a policy matter, to enforce such a revised first prong divorced from the second prong. We stated that, because enforcement of

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[58]*Syracuse Peace Council*, 2 FCC Rcd at 5048 ¶ 33.

[59]*Id.*

[60]*See id.* at 5048 ¶ 33, 5064 n. 99.

[61]*Id.* at 5065 n. 100, citing *EEOC v. All State Ins. Co.*, 570 F.Supp. 1224 (S.D.Miss.1983), appeal dism'd, 467 U.S. 1232 (1984) (legislative veto not severable from overall statutory scheme and, therefore, entire statute falls).

the first prong alone in this fashion would be largely duplicative of our existing enforcement of the requirement that broadcasters cover issues that are responsive to the needs and interests of their communities,[62] there would be no added public interest benefit to enforcing the first prong of the fairness doctrine as an independent policy.[63]

25. Petitioners do not directly dispute our holding that the two-part obligation imposed by the fairness doctrine is inseverable insofar as the two parts are necessary to give identity to the overall fairness obligation. They therefore have provided us with no basis for reconsidering our August determination that the two prongs of the doctrine are integral to the entire regulatory scheme of fairness and therefore should not be severed in this proceeding. Indeed, inasmuch as the doctrine, as a unified whole, was intended to provide a mechanism for governmental oversight of the "fairness," or balance, of broadcasters' coverage of certain controversial issues, the analysis in our August order applies to the first part of the fairness obligation, as well as to the second. Although differing in the scope of its coverage, the first portion of the doctrine was intended to function, in part, as a backstopping mechanism to preclude licensees from avoiding the requirement of balanced coverage by withdrawing from coverage altogether. Conversely, the second part operated in tandem with the first, insofar as it was perceived as

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[62]*See* generally *Report and Order* in MM Docket No. 83-670, 98 FCC 2d 1076, 1091-92 (1984), recon. denied, 104 FCC 2d 358 (1986), remanded on other grounds sub nom., *Action for Children's Television v. FCC*, 821 F.2d 741 (D.C.Cir.1987); *Report and Order* in BC Docket No. 79-219, 84 FCC 2d 968, 977- 83 (1981), *recon. denied*, 87 FCC 2d 797 (1981), rev'd on other grounds sub nom., *Office of Communications of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C.Cir.1983) [hereinafter cited as Radio Deregulation].

[63]*Syracuse Peace Council*, 2 FCC Rcd at 5048 ¶ 34.

undesirable to credit a licensee for coverage of an issue solely from a particular point of view rather than from a "balanced" perspective. In these respects, the doctrine as a whole was properly the subject of our August ruling.[64]

26. Notwithstanding this analysis, Geller and Lampert contend that our decision no longer to mandate that broadcasters present contrasting viewpoints on controversial issues of public importance (the second prong) does not justify, as a policy matter, a conclusion that broadcasters no longer be required to cover such issues at all (the first prong). To the extent that petitioners argue that we should enforce the first prong by itself more vigorously, we have already addressed that alternative as unsatisfactory.[65] More fundamentally, however, petitioners either misunderstand or simply disagree with our conclusion that, in today's competitive marketplace, discontinued enforcement of the fairness doctrine will promote broadcasters' coverage of controversial issues of public importance. Having eliminated the chilling effects most directly associated with the second prong of the doctrine, coverage of controversial issues will be forthcoming naturally, without the need for continued enforcement of the first prong. The solution to promoting increased coverage of controversial issues, therefore,

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[64]As such, we believe that parties had adequate notice that the continued validity of the doctrine in its entirety was at stake in this proceeding. Indeed, we note that the Court of Appeals remanded, for our consideration, the continued validity of the doctrine without differentiating between its two parts. Likewise, the Commission's general conclusions in the *1985 Fairness Report* went to the fairness doctrine as a whole. *See 1985 Fairness Report*, 102 FCC 2d at 246-47.

[65]As we stated in our Fairness Alternatives Report, 2 FCC Rcd at 5287-88 ¶ 116-20, and our 1985 Fairness Report, 102 FCC 2d at 161 n. 66, increased enforcement of the first prong of the doctrine would foster even greater governmental intrusion into the editorial process, requiring the determination of whether broadcasters' judgments as to the need for coverage of particular controversial issues comport with the government's judgments on those matters.

lies not with increased enforcement of the first prong obligation, but with elimination of the doctrine altogether.[66]

27. Finally, Geller and Lampert argue that we erred in concluding that the first part should not be severed and enforced separately because of its relationship to the existing issue responsive obligation already imposed on broadcasters. They also assert that, by eliminating the first prong obligation in our August order, we have called into question the continued validity of the issue responsive obligation. We reject both of these contentions. Initially, we note that, although the first part of the fairness doctrine may overlap with other regulatory requirements developed in other contexts, including the issue responsive programming obligation, we did not intend to suggest that the first part obligation under the fairness doctrine and the duty to air issue responsive programming are identical.[67] Thus, petitioners' view that, by eliminating the first prong of the doctrine, the Commission has effectively declared unconstitutional its policy requiring broadcasters to provide programming responsive to the needs and interests of their communities is incorrect. Indeed, the Commission explicitly noted in its decision that the constitutionality of the issue

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[66]We are not saying that the first prong could never be enforced separately; but if it were to be enforced as an independent policy, it would have to have its basis in an objective other than "fairness." Because the first prong, as it has developed, has been implemented as part of a regulatory scheme attempting to achieve "fairness," we have no basis to conclude here that it may be enforced separately in order to achieve a different goal.

[67]While enforcement of the doctrine's first prong requires the government to judge, on a case-by-case basis, whether a specific issue is both controversial and of vital importance to mandate coverage by the broadcaster, enforcement of the issue responsive obligation requires a different level of government intervention in determining, at renewal time, whether a broadcaster's overall programming covered the needs and interests of its community. *See, e.g., Radio Deregulation*, 84 FCC 2d at 983 n. 36; *Representative Patsy Mink*, 59 FCC 2d 987 (1976).

responsive obligation was not at issue in this case.[68] Issue responsive obligations remain in full force and effect, and to the extent that petitioners fear that licensees will no longer cover issues of interest to their communities, we believe that the continued existence of the issue responsive obligation should alleviate that fear. To the extent that petitioners fear that licensees will not cover *controversial* issues, we simply reiterate our conclusion that elimination of the chilling effects of the fairness doctrine should alleviate that fear as well.

IV. CONCLUSION

28. There is no question that our August order, by eliminating a policy that had been in effect for over three decades, has troubled those who have favored this obligation previously imposed on broadcast licensees. Nevertheless, our obligation under the Communications Act and the Constitution, as amplified by the Court of Appeals in its decision in *Meredith*, required us to evaluate a challenge to a 38-year old policy in the context of a markedly different setting from the one in which it was developed. In today's information marketplace, the fairness doctrine's excessive government intervention in the editorial process, and its documented chilling effect on constitutionally protected speech, compel us to conclude that it is no longer constitutional or in the public interest. As demonstrated by our August order, we do not undertake this determination lightly, but neither will we avoid reaching this compelling conclusion.

29. The public's interest — and indeed its first amendment right — to a free and robust exchange of ideas, unencumbered

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[68] *Syracuse Peace Council*, 2 FCC Rcd at 5065 n. 101. The Commission certainly had not developed, as part of the factual record for this proceeding, a record for purposes of reviewing the continued validity of licensees' issue responsive programming obligations.

by government intervention, will be better served by the elimination of an outdated policy whose very purpose was thwarted in its practical effect. We support the laudable goal of fairness in the coverage of controversial issues of public importance by broadcast licensees; we reaffirm, however, our conclusion that the government's attempt to mandate this goal through the enforcement of the fairness doctrine is unconstitutional and contrary to the public interest.

30. ACCORDINGLY, IT IS ORDERED that the Petition of Freedom of Expression Foundation for Partial Reconsideration of Order IS DENIED to the extend indicated herein and IS REFERRED, together with the corresponding oppositions filed thereto, for consideration in connection with the separate proceeding regarding the personal attack and political editorial rules.

31. IT IS FURTHER ORDERED that the Petition for Reconsideration of Geller and Lampert IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 89-312

In the Supreme Court of the United States

OCTOBER TERM, 1989

SYRACUSE PEACE COUNCIL, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Communications Act of 1934, 47 U.S.C. 301 *et seq.*, requires the Federal Communications Commission to retain the "fairness doctrine" notwithstanding the Commission's determination that the doctrine no longer serves the public interest.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-72a) is reported at 867 F.2d 654. The memorandum opinion and order of the Federal Communications Commission (Pet. App. 188a-281a) is reported at 2 F.C.C. Rcd 5043. The memorandum opinion and order of the Federal Communications Commission on reconsideration (Pet. App. 282a-306a) is reported at 3 F.C.C. Rcd 2035.

JURISDICTION

The judgment of the court of appeals (Pet. App. 73a-74a) was entered on February 10, 1989. The orders of the court of appeals denying rehearing and rehearing *en*

banc were entered on April 25, 1989 (Pet. App. 75a, 76a). By order dated May 15, 1989, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including August 23, 1989. The petition for a writ of certiorari was filed on August 23, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1949, in its *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949), the FCC set forth obligations that were thereafter known as the "fairness doctrine."[1] The fairness doctrine imposed a two-fold obligation on broadcasters. Each licensee of a radio or television broadcast station was required (1) to provide coverage of vitally important controversial issues of interest in the community served by the licensee, and (2) to afford a reasonable opportunity for the presentation of contrasting viewpoints on any controversial issue of public importance covered by the licensee. See *Fairness Report*, 48 F.C.C.2d 1 (1974), reconsid. denied, 58 F.C.C.2d 691 (1976), aff'd in part and remanded in part, *NCCB* v. *FCC*, 567 F.2d 1095 (D.C. Cir. 1977), cert. denied, 436 U.S. 926 (1978). Failure to abide by these requirements could subject a licensee to sanctions ranging from an order requiring

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[1] The Commission's efforts to ensure that broadcasters were "fair" in their coverage of controversial public issues can be traced to its early decisions and those of its predecessor, the Federal Radio Commission. See, *e.g.*, *Great Lakes Broadcasting Co.*, 3 F.R.C. Ann. Rep. 32 (1929), rev'd on other grounds, *Great Lakes Broadcasting Co.* v. *FRC*, 37 F.2d 993 (D.C. Cir.), cert. dismissed, 281 U.S. 706 (1930); *Chicago Fed. of Labor*, 3 F.R.C. Ann. Rep. 36 (1929), aff'd, *Chicago Fed. of Labor* v. *FRC*, 41 F.2d 422 (D.C. Cir. 1930); *Young People's Ass'n for the Propagation of the Gospel*, 6 F.C.C. 178 (1938).

the licensee to remedy its programming deficiencies to an order denying renewal of its license.[2]

In *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), this Court upheld the constitutionality of the fairness doctrine. Relying on the FCC's representation that it had no evidence that the doctrine chilled speech, the Court concluded that the doctrine would enhance, rather than abridge, First Amendment goals. The Court added, however, that if experience with the administration of the doctrine "indicates that [it has] the net effect of reducing rather than enhancing the volume and quality of coverage," the doctrine's "constitutional implications" would be subject to reconsideration. *Id.* at 393. Such a reduction in speech would be a "serious matter," the Court stressed, since "the purposes of the doctrine would be stifled." *Ibid.*[3]

2. In 1984, the FCC began a comprehensive reexamination of the public policy and constitutional implications of the fairness doctrine. See *Notice of Inquiry*, 49 Fed. Reg. 20,317. Based on the "voluminous factual record" compiled in that inquiry (which included more than 100 written comments and two days of hearings before the Commission), along with the Commission's

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[2] See, *e.g.*, *Patsy Mink*, 59 F.C.C.2d 987 (1976); *Public Media Center*, 59 F.C.C.2d 494 (1976); *Brandywine-Main Line Radio, Inc.*, 24 F.C.C.2d 18 (1970), aff'd on other grounds, *Brandywine-Main Line Radio, Inc.* v. *FCC*, 473 F.2d 16 (D.C. Cir. 1972), cert. denied, 412 U.S. 922 (1973).

[3] The Court reiterated the point more recently, stating that "were it to be shown by the Commission that the fairness doctrine '[has] the net effect of reducing rather than enhancing' speech, we would then be forced to reconsider the constitutional basis of our decision in [*Red Lion*]." *FCC* v. *League of Women Voters*, 468 U.S. 364, 378-379 n.12 (1984) (quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 393 (1969)).

own "experience in administering the doctrine" over many years and its "general expertise in broadcast regulation," the Commission concluded that the doctrine no longer serves the public interest in access to diverse sources of information. *In re Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143, 147 (1985) [hereinafter *1985 Fairness Report*] (Pet. App. 77a, 81a). The Commission also questioned whether the doctrine remained consistent with the First Amendment as it had been applied in *Red Lion*. *Id.* at 82a-93a.

Although the Commission "questioned the permissibility of the [fairness] doctrine as a matter of both policy and constitutional law" in the *1985 Fairness Report*, it decided not to eliminate or modify the doctrine in that proceeding. Pet. App. 180a-181a. The Commission noted that the fairness doctrine had been "a longstanding administrative policy," that "Congress [had] shown a strong although often ambivalent interest" in it, and that this Court's decision in *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984), "demonstrated an interest in [the Commission's] examination of the constitutional and policy implications underlying the fairness doctrine." *1985 Fairness Report*, Pet. App. 181a. In view of "intense Congressional interest in the fairness doctrine and the pendency of legislative proposals," the Commission determined that it would be inappropriate at that time to eliminate the fairness doctrine or to act on various proposals to modify or restrict it. *Ibid.*[4]

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[4] The Commission noted that a number of comments had addressed the question whether the Commission had authority to eliminate or substantially modify the fairness doctrine. Pet. App. 161a. It found that Congress had not "explicitly codified the fairness doctrine prior

3. In the meantime, in 1984, acting on a complaint filed by petitioner Syracuse Peace Council, the Commission concluded that television station WTVH in Syracuse, New York, licensed to Meredith Corporation, had violated the fairness doctrine. The Commission found that the station had aired a series of editorial advertisements that described the construction of a nuclear generating plant as a "sound investment" for New York, without adequately presenting contrasting viewpoints. *Syracuse Peace Council*, 99 F.C.C.2d 1389, 1395-1401 (1985).

In a motion for reconsideration, Meredith claimed that the fairness doctrine is unconstitutional. Adhering to the course it had adopted in the *1985 Fairness Report*, the Commission declined to consider Meredith's constitutional challenge. The Commission explained that it viewed Congress and the courts as "more appropriate venues for reacting to the constitutional question." *Syracuse Peace Council*, 59 Radio Reg.2d (P&F) 179, 182 (1985).

On review, the court of appeals upheld the Commission's determination that the station had not satisfied the requirements of the fairness doctrine. *Meredith Corp.* v. *FCC*, 809 F.2d 863 (D.C. Cir. 1987). However, noting that the *1985 Fairness Report* had cast "grave legal doubt on the fairness doctrine," the court of appeals held that the Commission was obligated to consider Meredith's constitutional challenge—unless the

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to the 1959 Amendments to the Communications Act" and that the doctrine did not "necessarily inhere[ ] in the public interest standard of the Communications Act." *Ibid.* The Commission characterized the question whether the 1959 amendments codified the doctrine as a "more difficult" one, but found that it need not reach the question in view of its decision to await further congressional consideration of the matter. *Ibid.*; see *id.* at 82a, 180a. To facilitate further congressional consideration, the Commission set forth at length the arguments on both sides of the issue. *Id.* at 161a-180a.

Commission determined that "in light of its Fairness Report it may not or should not enforce the [fairness] doctrine because it is contrary to the public interest." 809 F.2d at 873, 874. The court also noted that, in *Telecommunications Research & Action Center* v. *FCC*, 801 F.2d 501, reh'g denied, 806 F.2d 1115 (D.C. Cir. 1986) (en banc), cert. denied, 482 U.S. 919 (1987) [hereinafter *TRAC*], it had held that the fairness doctrine was not "mandated by statute"; thus, the court observed, that ground for resolving the case no longer remained available to the Commission. 809 F.2d at 873 n.11. See note 4, *supra*.

4. a. Upon remand, the Commission again requested comments from the public "on whether, in light of the *1985 Fairness Report*, enforcement of the fairness doctrine is constitutional and whether enforcement of the doctrine is contrary to the public interest." *Syracuse Peace Council*, 2 F.C.C. Rcd 794 (1987). An additional 50 comments were received from a variety of interests. Pet. App. 201a. In August 1987, the Commission issued its decision. *Id.* at 188a-281a. The Commission concluded—based upon the administrative record, the *1985 Fairness Report*, the Commission's experience in administering the fairness doctrine, its knowledge of the communications area, and fundamental constitutional principles—that "the fairness doctrine, on its face, violates the First Amendment and contravenes the public interest." Pet. App. 190a.

The Commission noted that in its *1985 Fairness Report* it had "evaluated the efficacy of the fairness doctrine in achieving its regulatory objective." Pet. App. 231a. The Commission reiterated the conclusons it had reached in that report on the basis of "compelling evidence"—that the operation of the doctrine "thwarts the purpose that it is designed to promote" and that "[i]nstead of enhancing the discussion of controversial issues of public importance," "the fairness doctrine, in operation, 'chills' speech." *Ibid.*

The Commission explained that the fairness doctrine "provides broadcasters with a powerful incentive not to air controversial issue programming above that minimal amount required by the first part of the doctrine." Pet. App. 231a. It noted that the *1985 Fairness Report* had documented 60 instances in which the fairness doctrine inhibited broadcasters' coverage of controversial issues, and that self-censorship was not limited to individual programs, but extended to policies under which stations refused to present editorials, to accept political advertisements, or to air nationally produced programming discussing controversial issues. *Id.* at 233a-235a; see *id.* at 103a-122a. The Commission reaffirmed its finding in the *Fairness Report* "that those specific instances of broadcasters' conduct were broadly illustrative of a prevalent reaction to the doctrine and that the record from the inquiry overwhelmingly demonstrated that broadcasters act upon those incentives and limit the amount of controversial issue programming presented on the airwaves." *Id.* at 233a-234a. The Commission also noted that enforcement actions, such as this proceeding, provide substantial disincentives to broadcasters. *Id.* at 235a.

The Commission found that isolated statements that individual broadcasters were not inhibited by the fairness doctrine did not "demonstrate generally an absence of a 'chilling effect' in the broadcasting industry." Pet. App. 237a. The Commission continued (*ibid.*):

> No broadcaster indicated to us that its coverage of controversial issues has increased as a result of the fairness doctrine, and absent such evidence to offset the numerous instances of chill that we have identified, we can only conclude that the *overall* net effect of the doctrine is to reduce the coverage of controversial issues of public importance, in contravention of the standard announced in *Red Lion*.

The Commission turned next to the question whether the fairness doctrine was narrowly tailored to serve a substantial government interest. The Commission noted that although it had once taken the position that it had an obligation to oversee programming to ensure the availability of diverse viewpoints to the public, the *1985 Fairness Report* had "repudiated the notion that it was proper for a governmental agency to intervene actively in the marketplace of ideas." Pet. App. 238a. The Commission reiterated the report's finding that the fairness doctrine "represents an intrusion into a broadcaster's editorial discretion, both in its enforcement and in the threat of enforcement." *Id.* at 239a.

The Commission also determined that the doctrine is no longer necessary to ensure the availability to the public of diverse viewpoints and information. The Commission relied on the finding of the *1985 Fairness Report* that there had been an "explosive growth in both the number and types" of information outlets since the *Red Lion* decision (Pet. App. 241a; see *id.* at 130a-155a), and noted that the advent and increased availability of other technologies such as cable and satellite television services had further enhanced the public's access to media outlets (*id.* at 242a). The Commission reaffirmed the conclusion of its *1985 Fairness Report* that "the fairness doctrine is not necessary in any market to ensure that the public has access to diverse viewpoints from today's media outlets." *Id.* at 244a-245a.

Taking all of these determinations into account, the Commission concluded (Pet. App. 247a):

> In sum, the fairness doctrine in operation disserves both the public's right to diverse sources of information and the broadcaster's interest in free expression. Its chilling effect thwarts its intended purpose, and it

> results in excessive and unnecessary government intervention into the editorial processes of broadcast journalists. We hold, therefore, that under the constitutional standard established by Red Lion and its progeny, the fairness doctrine contravenes the First Amendment and its enforcement is no longer in the public interest.

The Commission vacated its earlier order and dismissed the complaint against Meredith. *Id.* at 278-279a.[5]

b. In a subsequent decision, the Commission denied petitions for reconsideration. Pet. App. 282a-306a. The Commission rejected the contention that the fairness doctrine had been codified in a 1959 amendment to Section 315 of the Communications Act, 47 U.S.C. 315, or that it was inherent in the Act's general public interest standard. The Commission explained that it was bound by the D.C. Circuit's holding in *TRAC* that Section 315 of the Act did not codify the fairness doctrine, and it added that since the doctrine is unconstitutional, the doctrine's elimination is, "*a fortiori*, consistent with, not violative of, [the Commission's] public interest mandate." Pet. App. 290a-292a & n.33.

The Commission also rejected the argument that it was required to consider and adopt alternative means of enforcing the doctrine, rather than eliminating it altogether. In a separate proceeding, the Commission noted, it had concluded that while there were alternatives that were somewhat preferable to the then current method of enforcing the doctrine, the alternative that "best achieves

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[5] The Commission opinion explored at some length a "preferred constitutional approach" that it believed should apply in the present context. Pet. App. 247a-277a. In view of the court of appeals' disposition of the case on non-constitutional grounds, it is unnecessary to address that aspect of the decision.

the First Amendment principles underlying the doctrine, and consequently, [the Commission's] public interest objectives, would be an unregulated marketplace of ideas." Pet. App. 295a.[6]

Finally, the Commission determined that it had not erred in eliminating the first prong of the doctrine, under which broadcasters were obligated to address vitally important controversial issues. The Commission explained that it did not consider the two prongs of the doctrine severable and that, even if they were, the Commission "would not choose, as a policy matter, to enforce such a revised first prong divorced from the second prong." Pet. App. 301a. "Having eliminated the chilling effects most directly associated with the second prong of the doctrine," the Commission continued, "coverage of controversial

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[6] In 1986, Congress directed the Commission to conduct an inquiry to "consider alternative means of administration and enforcement of the Fairness Doctrine and to report to the Congress by September 30, 1987." Act of Oct. 18, 1986, Pub. L. No. 99-500, 100 Stat. 1783-67; see also H.R. Rep. No. 1005, 99th Cong., 2d Sess. (1986). In a comprehensive report adopted in August 1987, the Commission examined numerous alternatives to abandonment of the fairness doctrine and concluded that none eliminated the doctrine's chilling effect and its tendency to promote governmental intrusion into the editorial judgments of broadcasters. *In re Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees,* 2 F.C.C. Rcd 5272 (1987), reconsid. denied, 3 F.C.C. Rcd 2050 (1988). Accordingly, the Commission determined that only elimination of the fairness doctrine "is most likely to achieve the purpose of the fairness doctrine—namely, 'to preserve an uninhibited marketplace of ideas in which truth will undoubtedly prevail.' " 2 F.C.C. Rcd at 5276 (quoting *Red Lion,* 395 U.S. at 390). The Commission also concluded that its analysis of alternatives to the fairness doctrine "strengthen[ed] [its] belief that the fairness doctrine disserves the public interest and contravenes fundamental principles of free speech." 2 F.C.C. Rcd at 5295.

issues will be forthcoming naturally, without the need for continued enforcement of the first prong." *Id.* at 303a.

5. The court of appeals affirmed. Pet. App. 1a-72a. All three members of the panel filed opinions. All three upheld the Commission's findings that the obligation to provide contrasting views chills speech and that the availability of new media outlets and technology makes that obligation unnecessary to ensure that the public has access to diverse viewpoints. *Id.* at 13a-22a, 65a-70a. However, different majorities furnished the court's holdings with respect to that aspect of the fairness doctrine and the obligation to provide coverage of controversial issues.[7]

a. With respect to the second prong of the doctrine—the requirement that a broadcaster air conflicting views—Chief Judge Wald joined in portions of Judge Williams' opinion. Together, they held that the Commission's conclusion that that prong of the fairness doctrine does not serve the public interest was supported by the record; that conclusion, they also determined, provides a sufficient non-constitutional basis for the Commission's decision to eliminate the obligation to provide contrasting views. Judge Williams and Chief Judge Wald explained that the "Commission's factual judgments here are almost entirely predictive—statements about the overall effects of a policy on licensee and others." Pet. App. 14a. In such circumstances, they continued, "we owe great deference to the Commission's judgment." *Id.* at 13a. In a separate opinion, Judge Starr also affirmed the Commission's findings that the fairness doctrine reduces coverage of controversial issues and is unnecessary to assure the public's

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[7] All three members of the panel agreed that the *TRAC* decision was binding on the question whether the fairness doctrine is required by statute. Pet. App. 7a, 33a, 50a n.6.

access to divergent views. *Id.* at 62a. However, he concluded that the Commission's determination that the second prong of the fairness doctrine is no longer valid should be reviewed and upheld on constitutional grounds. *Id.* at 42a-72a.

b. Judges Williams and Starr concluded that the Commission's decision not to preserve the first prong of the fairness doctrine—the requirement that broadcast stations provide coverage of vitally important controversial issues in their communities—was not arbitrary and capricious. Pet. App. 27a-32a; *id.* at 70a-72a. Both found the Commission's determination that elimination of the second prong would make the first prong unnecessary to be reasonable, particularly in view of the Commission's findings as to the increasing diversity of outlets and programming. *Ibid.* Chief Judge Wald dissented from that aspect of the decision. *Id.* at 33a-41a.

ARGUMENT

Congress is presently considering legislation that could deprive the questions presented by this case of any future significance. Moreover, even if Congress should choose not to act, and thus to leave the decisions in *TRAC* and this case undisturbed, this case would not call for the Court's review. Given the basis on which the panel upheld the Commission's decision, the only questions properly presented are narrow—whether the Communications Act compels the Commission to apply the fairness doctrine and, if not, whether the Commission's decision to abandon the doctrine was arbitrary and capricious on the administrative record. The two courts of appeals that have addressed the issue have held that the Communications Act does not require the Commission to adhere to the fairness doctrine. That conclusion is well founded, and is en-

tirely consistent with the decisions of this Court, including *Red Lion*. Further review is therefore not warranted.

1. As petitioners note (Pet. 17-18 & nn.24-25, 22 & n.36), Congress has given substantial attention to the fairness doctrine during its last two Sessions. This legislative activity is consistent with the "intense Congressional interest" in the issue that the Commission noted in 1985. Pet. App. 181a. Legislation that would have codified the fairness doctrine as part of the Communications Act was adopted by both the House and Senate in 1987, but was vetoed by the President. See Pet. 18 n.25. Similar legislation has been introduced this year, and has been reported favorably by committees in both Houses.[8] The enactment of this legislation would deprive the question presented by the petition, which involves the construction of the present Act, of any future significance.[9]

2. Even apart from the possibility of congressional action, this case does not call for the Court's review.

a. Petitioners argue that the fairness doctrine was codified in a 1959 amendment to Section 315(a) of the Communications Act, 47 U.S.C. 315(a). However, the only two circuits that have addressed that question directly have concluded that the doctrine is *not* mandated by Sec-

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[8] See H.R. 315, 101st Cong., 1st Sess. (1989); H.R. Rep. No. 153, 101st Cong., 1st Sess. (1989); S. 577, 101st Cong., 1st Sess. (1989); S. Rep. No. 141, 101st Cong., 1st Sess. (1989). The House bill was included as part of the Omnibus Budget Reconciliation Act of 1989, H.R. 3299, 101st Cong., 1st Sess. (1989). It was passed by the House on October 5, 1989. See 135 Cong. Rec. D1135 (daily ed. Oct. 5, 1989).

[9] Should legislation be enacted while the case remains pending, the Commission and the court of appeals should have an opportunity to consider its application to this case and any constitutional questions that it might present. We disagree, therefore, with petitioners' suggestion (Pet. 22 n.37) that the passage of legislation could provide a basis for expedited review in this Court.

tion 315(a). *TRAC,* 801 F.2d at 517-518; *Public Interest Research Group* v. *FCC,* 522 F.2d 1060, 1066-1067 (1st Cir. 1975), cert. denied, 424 U.S. 965 (1976).[10]

As we explained in our brief in opposition to the petition for certiorari in *TRAC,* the Commission has "recognized that there is no easy answer to the question whether Congress has enacted the fairness doctrine as positive law or simply approved the doctrine as a permissible exercise of the Commission's authority to regulate broadcasters in the public interest." Brief for the Federal Respondents in Opposition at 8, in *Telecommunications Research & Action Center* v. *FCC,* No. 86-1371; see Pet. App. 166a-180a. Nevertheless, it remains our view that "the language of the statute and the legislative history, as interpreted by this Court in *Red Lion,* indicate that Congress has not codified the fairness doctrine as positive law." *TRAC* Br. in Opp. at 8-12.

On its face, Section 315(a)'s reference to the fairness doctrine does no more than protect the doctrine from inferences that might otherwise be drawn from the subsec-

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[10] Petitioners argue (Pet. 15) that the D.C. Circuit's interpretation of Section 315(a) of the Communications Act conflicts with the Seventh Circuit's "holding" in *Maier* v. *FCC,* 735 F.2d 220 (1984). However, in *Maier,* the court had no occasion to consider whether the Commission was obligated by statute to apply the fairness doctrine. In the course of considering whether the denial of a fairness doctrine complaint was a reviewable order, the court in *Maier* made a passing reference to this Court's observation in *Red Lion* that Congress " 'has ratified [the fairness doctrine] with positive legislation.' " *Id.* at 225 n.4. This reference adds nothing whatever to *Red Lion.* As we shall explain (pp. 16-17, *infra*), *Red Lion* stands only for the proposition that Section 315(a) recognized the Commission's authority to promulgate the fairness doctrine, and not that the Commission was obligated to do so. There is no conflict between *Maier* and the decision below on the question presented by this case.

tion's preceding sentence.[11] As *TRAC* explained, "The language, by its plain import, neither creates nor imposes any obligation, but seeks to make it clear that the statutory amendment does not affect the fairness doctrine obligation as the Commission had previously applied it." 801 F.2d at 517. The proviso thus does not deprive the Commission of authority it has from other sources to eliminate or modify the fairness doctrine. Indeed, on its face, Section 315(a) refers to the application of the fairness doctrine only "in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events," but not editorial advertising of the type

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[11] Section 315(a) provides (emphasis added):

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
>
> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection. *Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.*

that triggered this case. That limitation on the proviso confirms that its purpose is only to counteract an earlier sentence that has the same scope; surely Congress could not have intended to codify the fairness doctrine as to some types of broadcasts, but not others.

The legislative history does not justify a departure from the plain meaning of the savings clause. The purpose of the 1959 amendment as a whole was to overturn the Commission's decision in *Lar Daly,* 26 F.C.C. 715 (1959), which held that the equal opportunities requirement of Section 315 was triggered by the appearance of a political candidate on a newscast. As the Commission has observed, "the legislative history lacks clear record evidence demonstrating a reasoned consideration of the fairness doctrine which would indicate an intent by Congress to codify the doctrine. While there are scattered references to the obligations of broadcasters under the public interest standard to present both sides of controversial public issues by some members of Congress, there was no significant discussion of the Commission's fairness doctrine." 1985 Fairness Report, Pet. App. 169a. In view of the broad and flexible authority that Congress had delegated to the Commission to apply the Communications Act's "public interest" standard, we believe that Judge Bork's assessment of the legislative history in *TRAC* was correct: "It would have been extraordinary if Congress in 1959 had intended to strip the Commission of all further discretion in this area and to freeze by statute the fairness doctrine in the form it had in 1959. * * * One would have expected extended congressional discussion of the wisdom of such a move. There is none." 806 F.2d at 1121 (statement of Bork, J., in support of denial of rehearing en banc).

The Court's decision in *Red Lion* does not suggest otherwise. See Pet. 17. In that case, the issue was whether

the Communications Act *authorized*—not obligated—the Commission to promulgate the fairness doctrine. The Court took care to describe the process through which the Commission had developed the doctrine and to identify various statutes from which the Commission had derived its authority. 395 U.S. at 375-380. That discussion is incompatible with the view that the evolution of the fairness doctrine reflected only the Commission's performance of a mandatory statutory duty arising at the time that the Act was passed or when it was amended in 1959.

When the Court turned to the doctrine's recognition in various congressional actions, it said that the fairness doctrine "finds specific recognition in statutory form, is in part modeled on explicit statutory provisions relating to political candidates, and is approvingly reflected in legislative history." 395 U.S. at 380. If Section 315 had made the doctrine mandatory, the Court could have resolved any issue of the Commission's authority without referring to provisions on which the doctrine had been modeled or any other indicator of congressional approval. Similarly, after noting that Section 315(a) had "knowingly preserved" the Commission's efforts in the area of the fairness doctrine, the Court concluded that the doctrine was "a legitimate exercise of congressionally delegated authority" and that the actions subject to review were not "beyond the scope of the congressionally conferred power to assure that stations are operated by those whose possession of a license serves 'the public interest.' " 395 U.S. at 385, 396. That is not language that describes agency compliance with a mandatory statutory duty.

b. Petitioners claim that, even apart from Section 315(a), the general public interest standard of the Communications Act obligates the Commission to retain the

fairness doctrine. See Pet. 10-15. No decision of which we are aware supports that view, and it flies in the face of *Red Lion*'s discussion of the evolution and status of the fairness doctrine. Whatever construction is placed on the 1959 amendment to Section 315(a), it is "quite clear that Congress had not previously enacted the fairness doctrine." *TRAC,* 806 F.2d at 1119 (statement of Bork, J., on denial of rehearing en banc). As *Red Lion* put it, the period prior to the amendment of Section 315 was made up of "[t]hirty years of consistent administrative construction *left undisturbed by Congress,*" 395 U.S. at 382 (emphasis added), not thirty years in which that construction was mandated by Congress.

This Court has repeatedly recognized that Congress granted the FCC broad discretion to determine what "the public interest" requires under evolving conditions in the broadcast industry. See *FCC* v. *WNCN Listeners Guild,* 450 U.S. 582, 593-596 (1981); *Red Lion,* 395 U.S. at 379-380; *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 225 (1943); *FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 138 (1940). That flexible standard cannot fairly be construed to require adherence to the fairness doctrine at a point when the Commission determines that it has become counterproductive.

Based upon a voluminous administrative record, its familiarity with the broadcasting industry, and its experience with the fairness doctrine, the Commission has now found that the doctrine "disserves both the public's right to diverse sources of information and the broadcaster's interest in free expression." Pet. App. 247a. The Commission has also found, in view of developments in the broadcasting industry, that the doctrine is "not necessary in any market to ensure that the public has access to diverse viewpoints from today's media outlets." *Id.* at 244a-245a. The

court of appeals has sustained those findings under the appropriate standard of judicial review. The petition does not seriously challenge the court's analysis of the administrative record, and any question regarding the sufficiency of the support in that record for the Commission's findings would not raise an issue of a type warranting this Court's review. At this juncture, therefore, this case does not present a choice between a "public trustee concept" and a "print model" (Pet. 10) for regulation of the broadcast industry. Rather, the issue is whether the "public interest" standard in the statute requires the Commission to apply a doctrine that undercuts its own reason for being.

In their dire predictions regarding the effect of the Commission's decision on the broadcast industry (Pet. 13-15), petitioners greatly overstate the reach of the decision and ignore the express and inherent limits on the Commission's reasoning. By its own terms and as affirmed by the court of appeals, that decision is limited to the fairness doctrine itself, and goes no further than the Commission's determinations regarding that doctrine's effects in the broadcasting industry. The decision does not affect any other aspect of the regulatory scheme.

Thus, the decision does not "invalidate * * * the entire public interest regulatory scheme at renewal." Pet. 15. Existing FCC policies continue to impose substantial public interest responsibilities on broadcast licensees. For example, broadcasters would continue to have the basic obligation, enforceable through denials of license renewals, to provide "issue responsive" programming that meets the needs and interests of their communities.[12] The decision at

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[12] See *Commercial TV Stations*, 98 F.C.C.2d 1076, 1091 (1984), reconsid. denied, 104 F.C.C.2d 358 (1986), aff'd in part and remanded in part on other grounds, *Action for Children's Television* v. *FCC*, 821 F.2d 741 (D.C. Cir. 1987); *Deregulation of Radio*, 84 F.C.C.2d 968,

issue here has no effect on broadcasters' responsibility to provide programming directed to the special needs of children in their community of license,[13] and broadcasters continue to have the statutory obligation to provide candidates with equal opportunities and reasonable access under the Act. 47 U.S.C. 315, 312(a)(7). More generally, broadcasters will continue to have to demonstrate that their operations are in "the public interest" in order to obtain renewal of their licenses. 47 U.S.C. 309. The Commission made very clear that all of these obligations remain in effect after its decision in this case. Pet. App. 218a-219a n.91, 224a n.101, 291a-292a, 304a-305a.

Even as to policies that are closely related to the fairness doctrine, such as the personal attack and political editorial rules, the Commission stated that it would consider separately what effect, if any, its decision would have on those policies.[14] Any decision to modify those rules would

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977-978, reconsid. denied, 87 F.C.C.2d 797 (1981), aff'd in part and remanded in part on other grounds, *Office of Communication of United Church of Christ* v. *FCC*, 707 F.2d 1413 (D.C. Cir. 1983). Contrary to petitioners' assertions (Pet. 12-14), the Commission has emphasized that while a licensee, "in the exercise of its good faith judgment, will be able to address issues by whatever program mix it believes is appropriate in order to be responsive to the needs of its community * * *, [o]f course, broadcasters cannot engage in intentional [racial] discrimination in the selection of issues to be addressed in their programming." *Commercial TV Stations*, 98 F.C.C.2d at 1092 & n.53, citing *LaMar Life Broadcasting Co.*, 38 F.C.C. 1143, 1154-1155 (1965); see also *Deregulation of Radio*, 84 F.C.C.2d at 978.

[13] See *Children's Television Programming*, 96 F.C.C.2d 634, 655-656 (1984), aff'd, *Action for Children's Television* v. *FCC*, 756 F.2d 899 (D.C. Cir. 1985).

[14] Pet. App. 287a-288a. A separate proceeding is now pending with respect to the personal attack and political editorial rules. See *Repeal or Modification of the Personal Attack and Political Editorial Rules*, 48 Fed. Reg. 28,295 (1983).

be subject to judicial review based upon an administrative record permitting full consideration of the Commission's application of the Act's public interest standard to a record compiled for that purpose.

c. In its present posture, this case does not present the question whether *Red Lion*'s constitutional analysis remains good law or whether changes in the broadcasting industry require a different result under that analytical framework. See Pet. 18-21. Only Judge Starr considered the Commission's constitutional determination, and that portion of his opinion did not constitute part of the panel's holding.

d. Finally, petitioners contend (Pet. 21) that the court of appeals committed "clear error" in affirming the Commission's decision to eliminate the first prong of the fairness doctrine. However, at this juncture, the only issue is whether that decision was arbitrary and capricious. See Pet. App. 28a, 41a, 72a. The basis for the Commission's action was its determination that it "would not choose, as a policy matter, to enforce [the] first prong divorced from the second prong," since "enforcement of the first prong alone in this fashion would be largely duplicative of [the Commission's] existing enforcement of the requirement that broadcasters cover issues that are responsive to the needs and interests of their communities, [and] there would be no added public interest benefit to enforcing the first prong of the fairness doctrine as an independent policy." Pet. App. 301a-302a. The Commission also explained that "[h]aving eliminated the chilling effects most directly associated with the second prong of the doctrine, coverage of controversial issues will be forthcoming naturally, without the need for continued enforcement of the first prong." *Id.* at 303a. This Court has repeatedly recognized that judgments of this nature are entitled to "substantial judicial deference." *FCC* v. *WNCN Listeners*

Guild, 450 U.S. at 594-596; *FCC* v. *National Citizens Comm. for Broadcasting,* 436 U.S. 775, 810 (1978). The court of appeals' application of the appropriately deferential standard of review to the administrative record here is not a matter warranting this Court's further review. This is especially so in light of the fact that in the history of the fairness doctrine, there has been only one case in which the Commission has found that a licensee violated the first part of the doctrine. See *Patsy Mink,* 59 F.C.C.2d 987 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

SYRACUSE PEACE COUNCIL, *et al.*,
Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT MEMORANDUM IN OPPOSITION OF RESPONDENTS CBS INC., NATIONAL ASSOCIATION OF BROADCASTERS, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, AND REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

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Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 Minn. L. Rev. 67 (1967) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-312

SYRACUSE PEACE COUNCIL, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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JOINT MEMORANDUM IN OPPOSITION OF RESPONDENTS CBS INC., NATIONAL ASSOCIATION OF BROADCASTERS, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, AND REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

These respondents respectfully request that this Court deny the petition for a writ of certiorari filed herein on August 23, 1989, to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on February 10, 1989.*

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-72a) is reported at 867 F.2d 654. The memorandum opinion and order of the Federal Communications Commission

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* A minority of the stock of CBS Inc. is owned by Loews Corporation, a publicly-owned corporation.

(Pet. App. 188a-281a) is reported at 2 F.C.C. Rcd 5043. The memorandum opinion and order of the Federal Communications Commission on reconsideration (Pet. App. 282a-306a) is reported at 3 F.C.C. Rcd 2035.

JURISDICTION

The judgment of the court of appeals (Pet. App. 73a-74a) was entered on February 10, 1989. The orders of the court of appeals denying rehearing and rehearing en banc were entered on April 25, 1989 (Pet. App. 75a, 76a). By order dated May 15, 1989, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including August 23, 1989. The petition for a writ of certiorari was filed on August 23, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

ARGUMENT

I. THE CONSTITUTIONAL ISSUE WAS NOT DECIDED BY THE COURT OF APPEALS.

The primary thrust of the petition is to convince this Court to grant certiorari on an issue that was not decided by the court of appeals.[1]

At the agency level, the Federal Communications Commission ("Commission") did decide the constitutionality of the second part of the fairness doctrine which required the presentation of opposing views on controversial issues of public importance.[2] The Commission found that requirement to be unconstitutional because it served no substantial government interest[3] and had the effect of chilling speech.[4] The court of appeals affirmed the Com-

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[1] Pet. at 10.

[2] *Syracuse Peace Council*, 2 F.C.C. Rcd 794 (1987) (Pet. App. 190a, 245a-47a, 277a).

[3] Pet. App. 245a-46a.

[4] Pet. App. 246a-47a.

mission solely on the basis of the Commission's finding, as a policy matter, that the fairness doctrine no longer served the public interest.[5] This case thus presents no constitutional question for this Court's review.[6]

II. THE ISSUES DECIDED BY THE COURT OF APPEALS DO NOT WARRANT REVIEW BY THIS COURT.

The court of appeals decided that the Commission did not act arbitrarily in eliminating the second part of the fairness doctrine.[7] Petitioners do not contend that the court of appeals' decision upholding the Commission's elimination of the second part of the fairness doctrine conflicts with the decision of any other circuit or that it presents an important question of administrative law. Petitioners barely make an effort to show that this issue was incorrectly decided by the court of appeals,[8] and that issue does not warrant this Court's review.

The court of appeals also decided that the Commission did not act arbitrarily in eliminating the first part of the fairness doctrine.[9] That part of the doctrine required that broadcasters present views on controversial issues. Again, petitioners assert no conflict among the circuits and do not claim that the court of appeals has decided an important question of administrative law. In any event, this issue could not warrant review by this Court since the Commission has made clear in its decision below that the first part of the fairness doctrine is largely duplicative of a separate Commission requirement that requires the broadcast of issues-responsive programming, a re-

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[5] Pet. App. 8a, 32a.

[6] *Id.*

[7] Pet. App. 13a, 32a.

[8] Pet. at 14-15.

[9] Pet. App. 32a, 72a.

quirement that remains undisturbed by the decision below.[10]

The court of appeals also held that the fairness doctrine was not required by statute, basing its decision on a three-year old decision of the same court,[11] which found that the fairness doctrine had not been codified by statute and hence could be eliminated by the Commission.[12] This Court earlier denied certiorari to review that decision. Contrary to petitioners' contention,[13] the court of appeals' decision on this statutory issue does not conflict with the decision of any other circuit and, in fact, is consistent with the decision of the First Circuit in *Public Interest Research Group v. FCC.*[14]

Nor is the decision on the statutory question likely to be important in the future. Congress in recent years has devoted considerable attention to the question whether the fairness doctrine should be codified. Indeed, Congress in 1987 passed a bill to codify the doctrine, which was subsequently vetoed by the President.[15] As the petition itself recognizes, efforts to codify the doctrine—and opposition

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[10] Pet. App. 31a-32a, 224a n.101.

[11] *Telecommunications Research & Action Center* v. *FCC*, 801 F.2d 501 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987) ("TRAC").

[12] *Id.* at 517-18.

[13] Pet. at 15.

[14] 522 F.2d 1060, 1066-67 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976). *Public Interest Research Group* is the only case other than *TRAC* in which a court has squarely ruled on the question of whether the fairness doctrine was required by Section 315(a) of the Communications Act. In *Maier v. FCC*, 735 F.2d 220 (7th Cir. 1984), cited by petitioners, the court of appeals was not presented with this question and made only a passing reference to the codification issue.

[15] Fairness in Broadcasting Act of 1987, S. 742, 100th Cong., 1st Sess. (1987).

to those efforts—continues.[16] Under such circumstances the statutory issue does not warrant this Court's review.

In any event, the codification question was correctly decided by the court below. When the Radio Act of 1927, the predecessor of the Communications Act of 1934, was enacted, it contained no fairness doctrine, and Congress had, in fact, rejected proposals to require the presentation of opposing views on public issues.[17] Although legislative efforts to mandate such a doctrine continued to be defeated,[18] the Federal Radio Commission, predecessor of the Federal Communications Commission, began, as early as 1929, to develop on case-by-case basis a concept of fairness in broadcasters' treatment of public issues.[19] The fairness doctrine was first articulated in its present form by the Commission in 1949 in its Report on Editorializing.[20] When Congress exempted news and news-related programs from the equal opportunities requirement of Section 315 of the Communications Act, it made reference in that legislation to the fairness doctrine, stating

> Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.[21]

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[16] Pet. at 18 n.25, 22.

[17] *See* S. Rep. No. 772, 69th Cong., 1st Sess. (1926); 67 Cong. Rec. 5560 (1926).

[18] *See, e.g.*, H.R. Rep. No. 2106, 72nd Cong., 2d Sess. 4 (1933); S. Rep. No. 781, 73rd Cong., 2d Sess. 8 (1934); 78 Cong. Rec. 10988 (1934).

[19] *See, e.g., Great Lakes Broadcasting Co.*, 3 F.R.C. Ann. Rep. 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.) *cert. dismissed*, 281 U.S. 599 (1930).

[20] 13 F.C.C. 1246 (1949).

[21] 47 U.S.C. 315(a) (1982).

The language and legislative history of these 1959 amendments were interpreted by this Court of *Red Lion Broadcasting Co. v. FCC*.[22] There this Court rejected the contention that the fairness doctrine was not *authorized* by the public interest standard of the Communications Act:

> Thirty years of consistent administrative construction left undisturbed by Congress until 1959, when that construction was expressly accepted, reinforce the natural conclusion that the public interest language of the Act authorized the Commission to require licensees to use their stations for discussion of public isues . . . .[23]

At the same time the Court made plain that the 1959 amendments to Section 315 did not *require* the fairness doctrine. The Court found that the reference to the fairness doctrine in the 1959 amendments was an effort to "preserve" that administrative doctrine in the newly exempted areas: "Congress has acknowledged that the analogous provisions of § 315 are not preclusive in this area, and knowingly preserved the FCC's complementary efforts." [24] Specifically, the Court found that the defeated Proxmire amendment to the 1959 amendments, which would have "constituted a positive statement of the [fairness] doctrine," was altered "to the present *merely approving* language in the conference committee." [25]

The only other circuit expressly to consider this question, like the court below, has concluded that the "fairness doctrine is not a creature of statute." [26] In *Public Interest Research Group v. FCC*,[27] the First Circuit held that

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[22] 395 U.S. 367 (1969).

[23] *Red Lion*, 395 U.S. at 382.

[24] *Id.* at 385. Elsewhere the Court stated that Congress had "ratified" the Commission's efforts. *Id.* at 381.

[25] *Id.* at 383-84 (emphasis supplied).

[26] *Public Interest Research Group v. FCC*, 522 F.2d 1060, 1066 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976).

[27] 522 F.2d 1060 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976).

the Commission acted within its statutory authority when it excluded from the fairness doctrine those product commercials which did not explicitly address a public issue.[28] In rejecting the argument that Congress had " 'codified' both the fairness doctrine and the Commission's former application of it to product ads," the Court adopted the view that Congress, in 1959, merely, "acknowledged and generally endorsed the Commission's adoption of fairness standards." [29]

The view that the 1959 amendments merely protected the Commission's doctrine from an implied repeal is strongly supported by the legislative history. During consideration of the 1959 amendments, both the Department of Justice and the Commission expressed concern that in exempting news programs from the statutory equal time requirements, Congress should not inadvertently suggest that the Commission's fairness doctrine would no longer apply to such broadcasts.[30] In response to these concerns, the Senate Committee stated in its report that it wished to make "crystal clear" that the amendment would not affect the Commission's existing policy.[31]

Senator Proxmire, however, was not content with this approach. During the floor debates on the Senate bill,

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[28] *Id.* at 1066-67.

[29] Id. at 1066.

[30] *Political Broadcasting: Hearings Before the Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 75, 309, & n.3 (1959); *Political Broadcasts—Equal Time: Hearings on H.R. 5389, H.R. 5675, H.R. 6326, H.R. 7122, H.R. 7180, H.R. 7206, H.R. 7602, H.R. 7985 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 13, 122 & n.6 (1959). There was no suggestion by either the Department or the Commission that Congress should act to codify the doctrine.

[31] S. Rep. No. 562, 86th Cong., 1st Sess. 13 (1959).

he sought to make the fairness doctrine a congressional requirement and offered a modification that provided that nothing in the 1959 amendments to Section 315 should be construed to change "the basic intent of Congress . . . which recognizes that . . . all sides of public controversies shall be given as equal an opportunity to be heard as is practically possible" in all of the exempted categories of news programs.[32] With minor modifications, the Proxmire amendment was adopted and appeared in the final version of the Senate bill.[33]

The House substitute contained no provision comparable to the Proxmire amendment. Instead, the House bill, like the original Senate bill, simply exempted news programs from the equal time requirements of Section 315.[34] In conference, the Proxmire amendment was included in the final bill, but was modified to eliminate the statement ascribing the general fairness obligations to "the basic intent of Congress." Instead, as noted above, the final language referred to the fairness requirements as being "imposed . . . under" the Act. The conferees did not view themselves as enacting new statutory obligations, but rather intended to recognize the Commission's authority to enforce the fairness doctrine under the Act and to ensure that the exemptions to Section 315 were not read to abrogate that authority.[35] As this Court concluded in *Red*

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[32] 105 Cong. Rec. 14457 (1959).

[33] *Id.* at 14457, 14463.

[34] H.R. Rep. No. 802, 86th Cong. 1st Sess. 2 (1959).

[35] *See* H.R. Rep. No. 1069, 86th Cong., 1st Sess. 4-5 (1959), *reprinted at* 105 Cong. Rec. 17777 (1959) (emphasis supplied); *see also* 105 Cong. Rec. 17778 (1959).

This view of the scope of the 1959 amendments to Section 315 has been shared by a 1968 congressional staff study, *see Staff Study of the House Comm. on Interstate and Foreign Commerce, Legislative History of the Fairness Doctrine,* 90th Cong., 2d Sess. 29 (1968) (the "suggest[ion] that Congress, in its enactment of the 1959 amendments, intended neither approval nor disapproval of

Lion, the conferees modified the Proxmire Amendment from a "positive statement" to "merely approving language." [36]

Absent any clear expression of congressional intent to make the fairness doctrine a statutory requirement, it would be wholly inappropriate to view Congress as seeking inflexibly to codify Commission requirements such as the fairness doctrine when changing conditions may make modification or abandonment of the requirements appropriate—as has been the case with respect to the fairness doctrine.[37]

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the Fairness Doctrine, but intended to insure that Section 315 would not interfere with it . . . appears to be a more accurate reading of the legislative history than the alternative one that Congress intended a complete codification of the doctrine"), and by several commentators, *see, e.g.*, Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 Minn. L. Rev. 67, 134 (1967) (concluding that 1959 amendments preserve but did not require the fairness doctrine); Blake, *Red Lion Broadcasting Co. v. FCC: Fairness and the Emperior's New Clothes*, 23 Fed. Comm. B.J. 75, 81-82 (1969) (same).

[36] *See supra* at p. 6.

[37] *See Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973) (Commission requires "the flexibiltiy to experiment with new ideas as changing conditions require"); *id.* at 118 (opinion of Burger, C.J.) (recognizing the importance of giving the Commission "flexibility and the capacity to adjust and readjust the regulatory mechanism to meet changing programs and needs"); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 593 (1981) ("the public-interest standard of the Act [was designed to serve as] 'a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy' ") (citation omitted); *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943).

CONCLUSION

For the foregoing reasons, the petition for certiora[illegible] should be denied.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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REPLY BRIEF OF PETITIONERS

ARGUMENT

The Federal respondents have not answered petitioners' main argument — that the statutory scheme makes the broadcaster the public fiduciary for those kept off the scarce frequency by the Government and thus embodies the concept of the fairness doctrine. The respondents have also not answered our point that the decision below is based squarely on the applicability of the print model to the public interest standard of the Communications Act. They do not dispute that under the new policy, even the only broadcast station in a community can become a propaganda outlet for a single viewpoint,

serving only private and not *public* interests. An issue of such great importance to the nation should be decided now by this Court rather than put off in the slim hope that legislation may be enacted at some future time.

1. Respondents' suggestion (Br. at 13), that this Court should not pass on this most important issue because legislation will be enacted to deal with the issue, is undermined by the actual legislative record. In the 100th Congress, Congress did pass such legislation only to see it vetoed by the President (see Pet. at n.25); despite strong majorities, there evidently were not enough votes to override the veto. Instead, therefore, supporters sought to insert fairness legislation in a veto-proof bill, the end-of-the-session appropriations measure. However, they had to retreat because a Presidential veto was nonetheless threatened.[1] The current Congress certainly has the votes to reenact such legislation, but again faces a possible veto; it has therefore followed a similar strategy, placing the measure in the House-passed budget reconciliation bill. Again, however, the effort has failed.[2] The actual legislative pattern, persisting over several sessions, is thus one of stalemate between the Congress and the Executive Branch. In view of this pattern, legislation is possible but must be adjudged unlikely. The important issue that we have presented could thus well remain unresolved for years or indefinitely unless this Court acts now on the petition before it.[3]

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[1]*See Broadcasting Mag.*, December 28, 1987, at 31-32.

[2]*See The Washington Post*, Nov. 22, 1989, at A10.

[3]Significantly, in May 1987, *over two and one-half years ago*, the Federal respondents similarly relied upon the pendency of legislation to oppose the petition for writ of *certiorari* in *Telecommunications Research and Action Center* v. *FCC*, 801 F.2d 501 (D.C. Cir. 1987), *reh'g en banc denied*, 806 F.2d 1115, *cert. denied*, 482 U.S. 919 (1987)(herein *TRAC*). See Br. for the Fed. Respondents in Opp., in Case No. 86-1371, Oct. Term, 1986, at 15.

2. Our petition set out the statutory scheme illumined in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) — the need for Government licensing because many more wanted to broadcast than there are available channels; the Government's decision not to divide the broadcast day or week among many but to put one entity on the channel as a short term licensee obligated to serve as a fiduciary for those kept off by the Government; and thus that "it is the rights of the viewers or listeners, not the broadcasters, which are paramount." *Id.*, 395 U.S. at 391. We pointed out (Pet. at 12) that neither the court below, in relying on *TRAC* as the law of the circuit, nor the Commission, had taken into account this crucial statutory scheme, which mandates some form of fairness — that rather than just the views favored by the licensee, contrasting views be afforded the opportunity to be heard. The respondents' brief (pp. 17-19) still does not address that scheme. We again strongly assert that the fairness concept inheres in the public interest standard — in the holding in *Red Lion* that under the statutory scheme the broadcaster is a public fiduciary for its community.[4] That is why the 1959 Amendment to Section 315 reads as it does — "...the obligation imposed upon [broadcasters] under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." The 1959 amendment was thus simply reiterating what already inheres in the public interest standard, as the cited legislative history explicitly establishes (Pet. at 17).

The *TRAC* case stands alone in holding that fairness is not a statutory requirement. Significantly, that case emerged from a closely divided panel and full court (see Pet., at 16, n.22),

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[4]*See Maier* v. *FCC*, 735 F.2d 220, 226 (7th Cir. 1984) (herein *Maier*): "A broadcaster's compliance with the fairness doctrine is at the core of this 'public interest' standard."

but the opinion never discusses the public trustee scheme or standard.[5] The respondents err (Br. 14-15) in relying upon *Public Interest Research Group* v. *FCC*, 522 F.2d 1060, 1066-67 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976).[6] And what the respondents dismiss (Br. at 14, n.10) as a "passing reference" in *Maier, supra*, was a square holding that fairness has a statutory basis.[7]

3. Respondents reject (Br. at 19) our assertion that the case presents a choice between the "public trustee concept" and a print model for the regulation of broadcasting. But to do so, they are forced to ignore the holding of the court below, even though quoted at length in our petition (at 14-15). *The court below, specifically relying upon* Miami Herald Publishing Co. *v.* Tornillo, 418 U.S. 241 (1974) *and this Court's "finding of similar value judgments implicit in the First Amendment as applied to the print media...," sustained the Commission on one*

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[5]The issue was never briefed or argued orally to the court in *TRAC*. The FCC decision affirmed by the *TRAC* panel held only that "the 1959 legislative enactment concerning the Fairness Doctrine in Section 315 does not mandate extension...to new services like teletext, which did not even exist at the time when Congress acted." *Report and Order (Teletext)*, 53 Rad. Reg. 1309, 1323 (1983). The decision never addressed the public interest standard at all. For more than 20 years, the FCC repeatedly accepted the doctrine as statutorily required. See, *e.g.*, *Fairness Doctrine Inquiry*, 74 FCC2d 163, 178 (1979); *In re Obligations of Licensees under the Fairness Doctrine*, 23 FCC2d 27, 28 (1970); *Letter to Oren Harris*, 40 FCC 582, 583 (1963).

[6]The court there rejected the argument that Congress mandated "both the fairness doctrine and the Commission's application of it to product ads," holding that the 1959 amendment does not reach product ads since "Congress left questions of application and accommodation to the Commission." *Id.*, 735 F.2d at 1066-67.

[7]*See Maier, supra*, 735 F.2d at 225-26, n.5, where the majority, in responding to the dissent, held that the 1959 amendment constitutes a "statutory basis" for reviewing agency fairness rulings, rather than one simply "committed to agency discretion by law."

ground alone: that the Commission could similarly discount the value of speech generated by the fairness doctrine as "governmentally coerced speech." App. 25a. The court below thus held that as a matter of policy, the Commission is free to construe the public interest standard in accord with *Tornillo*, the print model where the rights of the speaker (publisher) are paramount, rather than as laid down in *Red Lion*, the public fiduciary model where the rights of the listeners or viewers are paramount. So construed, the FCC is not only free but should act to wipe out the agency requirements under the public interest standard to present children's television programming or community issue-oriented programs, since such fare is also "governmentally coerced speech" and contrary to the policy applied to the print media.

4. Respondents are obviously much embarrassed by our point (Pet. at 12-15) that under the new policy, Lamar Life Broadcasting Co., the licensee in *Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966) (herein *UCC*), would now be renewed as serving the *public* interest even though it would only present the segregationist viewpoint on the issue of integration in Jackson, Miss. They assert (Br. at 20, n.12) that under FCC rulings, "broadcasters cannot engage in intentional [racial] discrimination in the selection of the issues to be addressed in their programming." But the rulings cited (i) deal with the matter of community issue-oriented programming; (ii) were issued *before* the FCC's determination to eliminate the doctrine; and (iii) are ***premised upon the existence of the doctrine.***[8]

[8]Thus, in the cited decision in *Deregulation of Radio*, 84 FCC2d 968, 979, *recon. denied*, 87 FCC2d 797 (1981), *rev'd in part sub nom. Office of Communication of the United Church of Christ* v. *FCC*, 707 F.2d 1413 (D.C. Cir. 1983), the Commission said that "we expect adherence to the Fairness Doctrine" See also *id.*, 84 FCC2d at 980-82; *Commercial TV Stations*, 98 FCC2d 1076, 1095, n.63 (1984).

Even more inexplicable is the fact that the case relied upon by the Commission, "*LaMar Life Broadcasting Co.*" (*sic*) is the very same fairness case in which the court (per then Judge Burger) later reversed the FCC, holding that compliance with the fairness doctrine is the "*sine qua non*" of every broadcast licensee if it is to obtain renewal. *UCC*, *supra*, 359 F.2d at 1009.

We strongly advanced this same argument based on *UCC* to the FCC in both the 1985 and 1987 proceedings on the fairness doctrine. The agency did not answer as its counsel does now — that the *UCC* situation will still be handled under prior rulings. On the contrary, the *UCC* case is mentioned only in the 1985 Report, where the agency incredibly cites it for the proposition that the Government was chilling "abhorrent or extreme" opinion. See *1985 Fairness Report*, 102 FCC2d 143, 227, n.169(1985)(App.123a). Counsel is thus impermissibly trying to shift the basis of the agency's action.

This is further shown by analysis of counsel's argument. With the fairness doctrine eliminated, broadcasters are free to present only one side of an issue, rather than being required to afford reasonable opportunity for contrasting views. Respondents cannot seriously argue that the Commission will nevertheless examine whether the broadcaster's decision to cover only one side is "intentional" discrimination and therefore subject to governmental remedial action. Such an examination into mental processes would be a First Amendment horror, and in any event makes no sense: The FCC would have eliminated the fairness doctrine only to substitute another doctrine (no intentional discrimination in the coverage of issues) which would even more severely impinge upon the broadcaster's discretion. Finally, and most significantly on this point, respondents do not dispute our point (Pet., at 13) that with the elimination of the doctrine, broadcasters can now

become proselytizing organs, presenting only the viewpoints with which they agree or for which they receive payments. But see *Red Lion, supra*, 395 U.S. at 392.[9]

[9]Respondents defend (Br. at 21-22) the Commission's elimination of the first prong of the doctrine — the duty to present controversial issues — on two grounds. We have already dealt with the ground upon which the court below sustained the Commission (see Pet., at 21-22). We simply point out here that the other ground recited by the Commission — the requirement is duplicative of an existing obligation to present community issue oriented programming — was rejected by two of the three judges below, and acknowledged to be in error by the agency itself. See n.34, Pet.; ***Memorandum Opinion and Order on Reconsideration***, at App.304a.

CONCLUSION

It is incorrect for respondents to argue that only some "narrow" issue is presented by the petition. Broadcasting, especially television, is the primary medium upon which the American people rely in informing themselves on issues to be determined through the democratic process. The decision of the Commission, as affirmed by the court below, profoundly affects the broadcast process in this vital respect. We therefore urge the Court to grant the petition and rule on whether the broadcaster remains a public fiduciary or is free to act in its private interest on the scarce channel or frequency bestowed upon by it by the Government (with all others excluded by the Government).

Respectfully submitted,

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